SELECTED DECISIONS

of the

NATIVE APPEAL COURT

CAPE and O.F.S.

1931.

(Official.)

Vol. 3.

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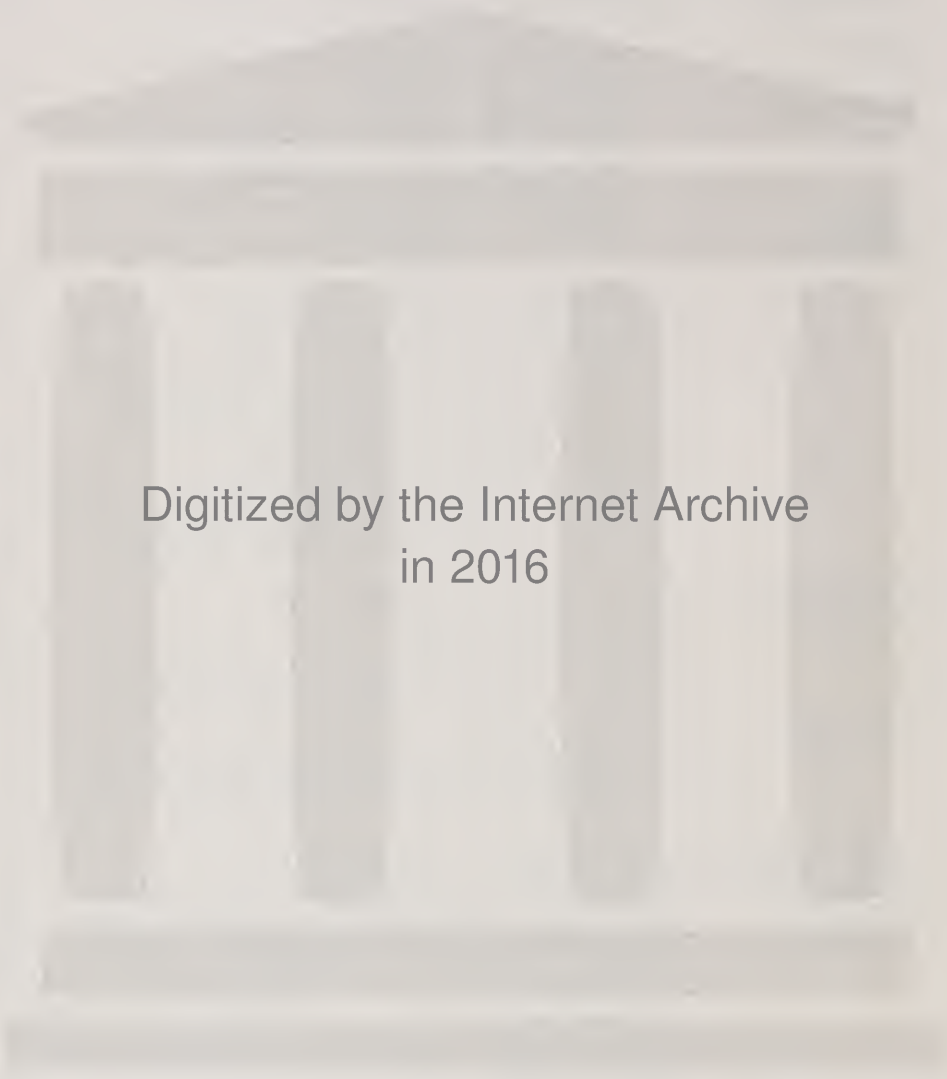
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SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT:

(CAPE AND ORANGE FREE STATE).

-oOo-

VOLUME THREE.

CASE NO. 1.

THOMAS KWATSHA versus BETHWELL & BEN SIHLUKU.

KING WILLIAM'S TOWN: January, 21, 1931.

Before J.M.YOUNG, President and J.W.ORD & M.W.HARTLEY, Members of the Native Appeal Court, (CAPE & O.F.S. DIVISION).

-oOo-

NATIVE CUSTOM: 'ISIHEWULA' - SEDUCTION NOT FOLLOWED BY PREGNANCY - FINE OR DAMAGES PAYABLE UNDER FINGO CUSTOM (IN CISKEI).

(Appeal from the Native Commissioner's Court: ALICE, V.E.).

-oOo-

The Plaintiff, now Appellant, sued the Defendant for 5 head of cattle or their value £25 as damages for the seduction of his daughter. The Defendant admitted the seduction and defloration of the Plaintiff's daughter. He denied liability for 5 head of cattle or £25, and said that a tender of 2 goats or 1 beast had been made before the issue of summons & that, as pregnancy did not follow as a result of the seduction; and as there were no aggrav-:ating circumstances, the tender was sufficient & should have been accepted. The Plaintiff admitted the tender but said that it was made after the issue of the summons.

After hearing expert evidence on the custom as it obtains amongst the Fingoes residing in the District of Victoria East, the Commissioner entered judg-:ment for the Plaintiff for 1 beast or its value £5 and costs of suit to date of tender.

Against this judgment the Plaintiff has appealed on the grounds that it is contrary to Native Custom & that the damages awarded are inadequate.

The question as to the number of cattle paid as a fine for seduction unaccompanied by pregnancy is put to the Native Assessors. They unanimously state:

> "When a girl has been seduced by a man with whom she has slept, it would be called 'Ukuhewula'. The women of the kraal would take the girl to the kraal of the young man & would there pick out the best beast, take it away & slaughter it. That would dispose of the 'Ukuhewula'. No further beast would be payable. The women of the kraal to which the girl belonged being responsible for the girl's body would have discharg-:ed their obligations. The father or guardian takes action only when seduction is followed by pregnancy.

With.../

"With regard to the age of the girl her parents would know she was 'Metshaing' with the man & her age makes no difference."

This expression of opinion is accepted by this Court as a correct statement of custom as observed by the Fingoes in the Ciskei and, there being no circumstances of aggravation which would warrant higher damages, the Appeal must fail and is accordingly dismissed with costs.

-O-

No.4

CHANCE NCULU VS. JAMESON MANDLANA

KINGWILLIAMSTOWN: 21st JAN. 1931.

Before J.M.Young, President and J.W.Ord & M.W.Hartley, Members of the Native Appeal Court (Cape and O.F.S.)

INTERPLEADER: SALE: DELIVERY: JUDGMENT DEBTOR: POSSESSION OF A MOVABLE RAISES A PRESUMPTION OF OWNERSHIP: PERSON CLAIMING OWNERSHIP ON GROUND THAT HE HAS PURCHASED MOVABLE FROM PERSON WHOM HE WAS ALLOWED TO REMAIN IN POSSESSION OF IT MUST REBUT PRESUMPTION OF OWNERSHIP BY CLEAR AND SATISFACTORY EVIDENCE:

(Appeal from Native Commissioner's Court: Keiskamahoek).

The Respondent obtained a judgment in the Court of the Native Commissioner at Keiskamahoek against Sitwayi Ngculu for £15, and costs of suit, and a warrant of execution was issued to satisfy this judgment. Four head of cattle, ten sheep and four lambs were attached at the kraal of the judgment debtor. Three head of cattle were attached at the kraal of Solomon Lupuzi and two head of cattle at the kraal of Simanga Nkenca. Interpleader proceedings followed and the three head of cattle attached at the kraal of Solomon Lupuzi and one of those attached at the kraal of the judgment debtor were claimed by the Appellant. These were declared executable with costs and an appeal against this judgment is brought by the Claimant on the grounds that the judgment is against the weight of the evidence and that the presiding judicial officer erred in allowing hearsay evidence to be adduced by the execution creditor.

It appears from the evidence that the Messenger of the Court made two journeys to the kraal of the judgment debtor, one on the 21st July 1930, and the other two days later. On the occasion of the Messenger's first visit all the stock attached were in the possession of the judgment debtor but on his second visit three head of cattle had been removed to Solomon Lupuzi's kraal, and two to Simanga Nkenca's.

The Appellant's case is that he purchased the cattle attached at Solomon Lupuzi's kraal from the judgment debtor and that the red and white ox attached at the judgment debtor's kraal was allotted to him by his father out of the dowry of his sister under the custom of "ukufakwa".

Now for the purposes of this case, the cattle must be regarded as having been attached in the possession of the judgment debtor and the onus of proof, therefore, lies on the Claimant.

The...../

The Assistant Native Commissioner found that the claimant had failed to discharge the onus which rested upon him and came to the conclusion that the claim was a bogus one and was set up with a view to defeating the claim of the Execution Creditor. This Court is not prepared to disturb this finding.

In the case of Policansky Brothers versus Hanau (25 S.C. 672), Hopley J. said:-

"There is a presumption of law, no doubt, and a pre-"sumption, I think of common-sense, that, when goods are "found in the possession of anyone, they belong to that "person; and, when there is a debtor in the ostensible "possession of furniture or anything else, the things "that are found in his possession and taken possession "of by the Sheriff or Messenger of the Court, who is "charged with the execution of a judgment, would "prima facie be deemed to be the goods of such debtor, but " it appears to me that the presumption, although I think "it is a perfectly proper one, is one which should be "considered in view of the circumstances of each parti-"cular case, and which can be swept away and upset by " evidence".

And in the case of Zandberg versus Van Zyl, (1910. A.D.302), De Villiers C.J., said:-

"Possession of a movable raises a presumption of owner-"ship; and, therefore, a claimant in an interpleader suit "claiming the ownership on the ground that he has bought "such movable from a person whom he has allowed to retain "possession of it, must rebut that presumption by clear "and satisfactory evidence".

In the present case the evidence of the sale and the allotment is far from satisfactory. The explanation why the animals were allowed to remain in the possession of the seller (the Judgment Debtor) is not at all convincing.

Furthermore, his statement as to the source of the £15 which he alleges he paid to the judgment debtor as the purchase price of the three head of cattle does not bear the stamp of truth. If as he says his superior officer kept all his savings and also his savings bank book, it is difficult to understand why he kept so large a sum as £15 in his hut which would be nearly 4 month's wages.

Even if the evidence objected to is inadmissible, the Acting Native Commissioner was not influenced by it and the Appellant has not been prejudiced by its admission.

The appeal is dismissed with costs.

- O -

NO.3.

AARON WILLIAMS VS. NATHANIEL MGOLE.

KINGWILLIAMSTOWN: 21st JAN. 1931.

Before J.M.Young, President, and J.W.Ord & M.W.Hartley, Members of the Native Appeal Court(Cape and O.F.S. Division),

NATIVE...../

NATIVE CUSTOM: ILLNESS AND DEATH OF WIFE OR FEMALE PARTNER: LIABILITY OF HUSBAND OR MALE PARTNER FOR MEDICAL FEES AND FUNERAL EXPENSES:

(Appeal from the Native Commissioner's Court: Queenstown).

In this case the Plaintiff sued the Defendant for the sum of £14.15.0, disbursed by him in connection with the last illness and burial of the Defendant's wife.

The admitted facts are that shortly after her marriage, the Defendant's wife became ill, that her father sent her to the Plaintiff, the Defendant's brother-in-law, for care and treatment, that the Plaintiff caused her to be medically treated, that she died in the Grey Hospital at Kingwilliamstown, and that the Plaintiff expended a sum of £10.16.0, in connection with her treatment and funeral expenses.

It is contended on behalf of the Appellant, Defendant in the Native Commissioner's Court, that the judgment of the trial Court awarding the Plaintiff the sum of £10.16.0, and costs is wrong and contrary to law and Native Custom in that the Defendant did not authorize the Plaintiff to incur any expenditure and that the Defendant's wife's father, having taken her away under Native Custom, is liable.

In the case of Ntsentselele vs. Rangana. (3.N.A.C. 66.) the Native Assessors stated:- "Under Native Custom a married woman becoming ill should be doctored by her husband, even if only recently married. There are cases when she is doctored by her father but this is done by consent and out of the father's generosity. We know of no case where such treatment is supplied by her father as an obligation".

From the above statement of Custom it seems clear that a husband is liable for the medical treatment and funeral expences in connection with the interment of his wife.

In the present case, although the Defendant did not request the Plaintiff to render the services which he did he nevertheless was aware of what was happening and acquiesced in the action taken. There is a well recognised equitable principle of law that no one shall become the richer to the loss or injury of another. This principle seems to be eminently applicable to the present case where a third party has discharged the duty which the husband owed to the wife and this Court is of opinion the husband should make good to the Plaintiff what he has expended and thus relieved him (the husband) from paying.

The Appeal is dismissed with costs.

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No. 4.

TEMBANI GAGA VS. JOHN DYABA.

KINGWILLIAMSTOWN: 21st JAN: 1931.

Before J.M.Young, President, and J.W.Ord & M.W.Hartley, Members of the Native Appeal Court(Cape and O.F.S. Division),

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DISSOLUTION...../

DISSOLUTION OF CUSTOMARY UNION: USUAL PRACTICE IS TO CLAIM RESTORATION OF WIFE OR RETURN OF DOWRY. ALLOWANCE OF ONE HEAD OF CATTLE MADE FOR EACH CHILD BORN OF CUSTOMARY UNION ON DISSOLUTION OF SUCH UNION.

(Appeal from the Native Commissioner's Court: Stutterheim).

The Plaintiff in this case sued the Defendant for the return of five head of cattle and one mare or their value the sum of £35, being the dowry paid by him to Defendant in respect of a customary union entered into by him with the Defendant's daughter. In his particulars of claim he alleged that during the month of August, 1930 his wife or partner deserted him and, notwithstanding repeated requests, she neglects and refuses to return to him.

Before pleading the Defendant excepted to the summons on the ground that "Act 38 of 1927 in respect of Lobolo claims is not retrospective and therefore Plaintiff cannot claim the return of the lobola cattle". This exception was over-ruled.

The Defendant, in his plea or answer to the claim, admitted the union and the receipt of the dowry. He denied that his daughter had deserted the Plaintiff and said that Plaintiff, after consultation with a witch doctor, named or indicated her as a witch and imputed to her the use of non-natural means in causing the death of the Plaintiff's child, and ordered her to return to her parents

Evidence at considerable length was led and the Assistant Native Commissioner found, on this evidence, that the Defendant had failed to establish his plea and entered judgment for Plaintiff in terms of his prayer with costs of suit.

The Defendant has appealed on the following grounds:- "(1). That the Assistant Native Commissioner has erred in disallowing the exception to the effect that Plaintiff cannot claim the return of the lobolo cattle on the ground that Act 38 of 1927, in respect of lobolo claims, is not retrospective and that his decision in so doing is contrary to Law.

(2) That the decision of the Acting Native Commissioner is against the weight of evidence.

(3) Should the Court hold that the judgment of the Assistant Native Commissioner is otherwise in accordance with law and custom, then the Defendant appeals against the judgment to the extent that the Assistant Native Commissioner has omitted to allow the deduction of one beast from dowry paid in respect of the one child admittedly born of the customary union, such beast being a recognised deduction under Native Law and Custom."

Dealing with the first of these grounds this Court is of opinion that the Assistant Native Commissioner correctly overruled the exception. As stated in the case of Moroka vs. Moroka heard at Thaba'Nchu in December 1929.

"Chapter..../

"Chapter IV. of the Native Administration Act, which embraces sections 9 to 21 inclusive, has been of force and effect since the 1st September 1927 and, on that date it gave the protection of law to rights then existing and based on Native Custom. It also made cognizable by Courts of law obligations corresponding to such rights, subject to certain defined limitations. In other words the authorizations, commands and prohibitions of Native Law theretofore ineffective came into effective existence simultaneously with the Act".

In this case the customary union which was entered into in 1926, subsisted at the date of the taking effect of the Act and on that date the relations which existed between the parties were ratified by the Act.

The second ground of appeal attacks the judgment on the facts. The onus of proof was on the Defendant. The Assistant Native Commissioner has found that he has not discharged that onus. In his reasons for judgment he has dealt very fully and very carefully with the facts and the Court considers that there is ample evidence on the record to justify his finding which it is not prepared to disturb

The third ground of appeal falls away the Respondent having abandoned portion of the judgment to the extent of one beast or its value £5.

It is a well established principle of Native Law and Custom that one dowry beast is deducted for each child born of a customary union and the Respondent rightly abandoned the judgment to that extent.

In all cases of this nature it is customary to sue for the restoration of the wife failing which the return of the dowry cattle. In the present case there is no prayer in the summons for the restoration of the wife and as it appears from the evidence that the husband is anxious that his wife should return to him this Court considers that the judgment of the trial Court should have been one for the return of his wife within a specified time failing which the return of the dowry cattle.

The appeal will be dismissed with costs but the judgment of the Court below will be altered to "Judgment for Plaintiff for the restoration of his wife within one month failing which the return of five head of cattle or their value £25 and costs of suit".

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NO. 5.

STOKFEL MORRIS & MORRIS NKOLONGO VS. JAMES GCAZA

KINGWILLIAMSTOWN: 17th OCT. 1930.

Before J.M.Young President, and H.W.Drew & C.W.Crawford. Members of the Native Appeal Court(Cape & O.F.S.Division)

SEDUCTION - NOT PROVABLE BY THE MERE OATH OF THE WOMAN.
APPLICATION - NOT PROVABLE BY THE MERE OATH OF THE MOTHER ONLY.
AFFILIATION:

(Apreal from the Native Commissioner's Court:Kingwilliamstown).

In..../

In this case the Defendants, Stokfel Morris and Morris Nkolongo, were summoned to answer James Gcaza in an action in which the Plaintiff claimed five head of cattle or £25, their value as damages sustained by him by reason of the first named Defendant having seduced and rendered pregnant his daughter Dombo. The first named Defendant is the son of the second named Defendant and resides at his kraal. The second named Defendant is sued in his capacity as guardian of the first named Defendant and as such, liable for the latter's torts. In the plea the Defendants denied that the Plaintiff's daughter had been seduced by the first named Defendant and that he was responsible for her pregnant condition.

After the evidence of the Plaintiff, his daughter and the messenger who was sent by the Plaintiff to report the matter to the Defendants had been heard and the Plaintiff had closed his case, the Defendants' Attorney applied for an absolution order on the ground that there was no corroboration of the woman's evidence. This application was refused by the Additional Native Commissioner The Defendant's Attorney then intimated that he was not prepared to lead any evidence and closed his case. Judgment was thereupon entered for the Plaintiff in terms of his prayer with costs.

The only question for this Court to determine is whether the unsupported and unrebutted testimony of the woman is sufficient to establish the Plaintiff's case and to fix the paternity of the child on the Defendant.

It has been laid down in a long succession of cases that the rule of law in cases of seduction is that more than the mere statement of the parties concerned is required and that there must be some evidence aliunde in order to enable the woman's oath to be preferred to the man's; there must be some evidence apart from the woman's own statement and bearing on the matter of her seduction which leads one to believe her rather than the man. In other words, it is incumbent upon the Plaintiff to bring forward such corroborative evidence as to justify a Court in coming to the conclusion that, notwithstanding the Defendant's denial, there had been seduction. There must be some reasonable corroboration of the woman's statement.

The principle which applies in cases of this sort has been very clearly stated in the case of Le Roux vs. Neethling (5.S.C.247). There the late Chief Justice, Lord de Villiers, said:-

> "I think it may be laid down as a general rule that the Plaintiff who seeks to fix the paternity of an illegitimate child on a man must clearly prove it, and must be corroborated by some independent testimony, and in case of doubt judgment must be given in favour of the Defendant. This, I think, may be stated to be the general effect of the authorities and of our practice",

Applying these principles to the present case, this Court is of opinion that the appeal must succeed and the judgment of the Additional Native Commissioner is accordingly altered to one of absolution from the instance with costs. Costs of appeal to be borne by the Respondent.

-- OOOO ---

O 6.

MABUTI DUMALISILE VERSUS NONTWANYA MQANANANGO

U M T A T A: 11th February, 1931.

Before J. M. Young, President and O.M.Blakeway & W.C.H.B.Garner, Members of the Native Appeal Court(Cape and O.F.S.Division).

ADULTERY: PROOF "CATCH" KISSING REGARDED AS A "CATCH" AND CORROBORATION OF PREVIOUS ACTS OF MISCONDUCT:

(Appeal from the Native Commissioner's Court: Umtata).

The Plaintiff in this case sued the Defendant for £15 as damages for adultery. In his particulars of claim he alleged that from or about the winter of 1929 the Defendant wrongfully and unlawfully committed adultery with his wife, Nowebile, at or near Siralarala's kraal and at or near the Mpa river, that on or about the 31st August 1930, at Ntliziyombi's kraal he caught the Defendant in the act of kissing his wife and that he took from him a horse, saddle and bridle - since returned to Defendant - as Ntlonze.

In his plea the Defendant denied the adultery. He also denied that he was caught in the act of kissing the Plaintiff's wife and said that whilst he was in conversation with her the Plaintiff assaulted him and took from him his horse, saddle, saddle cloth, bridle and saddle straps. He claimed in reconvention the restoration of the saddle, saddle cloth and saddle straps or their value £7.15.0, £10 damages for assault and £10 as damages for the spoliation of his horse, saddle, bridle etc.

In his plea to the counterclaim the Plaintiff admitted taking the Defendant's horse, saddle and bridle and said that these were taken as Ntlonze and that they have since been returned to the Defendant or his Attorney. He denied liability in any sum as damages.

From the evidence of the Plaintiff and his witnesses it appears that on the 31st of August 1930 a beer gathering was in progress at Ntliziyombi's kraal, that the Plaintiff's wife attended this gathering, that the Defendant, who is a minor chief came to the kraal with one follower that the Plaintiff, who had been herding his stock, visited the kraal, that he entered the cattle fold and on emerging therefrom he came upon the Defendant in the act of kissing his wife that he caught hold of the Defendant and dispossessed him of one of his sticks. The Defendant ran off and was chased by the Plaintiff who raised an alarm. He failed to catch the Defendant and returned and possessed himself of the Defendant's and his companion's horses and trappings which he took to the headman, Paramount Chief, Police, and subsequently to his Attorneys. It also appears that during the winter of 1929 while Plaintiff's wife was on a visit to Siralarala's kraal

kraal in the location in which the Defendant lives, the Defendant had sexual relations with her and that during the month of March 1930, he again had intercourse with her near the Mpa river.

The Defendant admits meeting the Plaintiff's wife at Ntliziyombi's kraal on the 31st August 1930, He says that he does not know her. He denies kissing her and having committed adultery with her. He admits that when the Plaintiff came upon him he was speaking to his wife but says that she addressed him and enquired after the health of her Aunt. He goes on to say that the Plaintiff assaulted him, took possession of his and his companion's horses and trappings and also his stick and that Ntliziyombi and all the men at the kraalprevented further assault on him. Ntliziyombi, Simemo and Minya, his companion, support him.

The Additional Native Commissioner believed the Plaintiff and his witnesses as to what occurred at Ntliziyombi's kraal and also the evidence in regard to the adultery whilst Plaintiff's wife was at Siralarala's kraal. He was doubtful as to the act of adultery at the Mpa river, mainly because the Plaintiff's wife was at that time suckling a three months' old child. He says that but for the strong taboo placed by custom so soon after child birth the Court would have believed the Plaintiff's witnesses regarding the incident at Mpa. It is true that it is not usual for a woman to allow her husband to have intercourse with her whilt she is suckling a child but it is quite a common thing for her to permit her paramour to do so.

On the whole of the evidence this Court is satisfied that the Plaintiff has established his case. The story told by the Defendant of the incident at Ntliziyombi's does not bear the stamp of truth. If his behaviour was innocent it seems almost inconceivable that the Plaintiff would have treated him in the way he did. He is a man of some rank and would not have been molested by a commoner without some provocation.

It has been contended that the act of kissing a man's wife does not constitute a "catch" in Native Custom and in support of this contention the case of Bekizulu vs.Mkonywana (4.N. .C.p 11) has been quoted. This Court is not prepared to uphold this contention. In strict Native Custom such familiarity would be regarded as a catch and afford very strong corroboration of any previous act or acts of alleged intimacy.

With regard to the counterclaim it is admitted that all the articles alleged to have been taken from the Defendant with the exception of four straps have been restored. The evidence that there were any straps attached to the saddle is not conclusive. The Additional Native Commissioner did not believe the Defendant that he was assaulted and states that any rough handling he received was justified. This Court sees no reason to differ.

The appeal is dismissed with costs.

1932 (T I N) 34

NO. 7.

SOPHIA BASI VERSUS MANDLANGISA.

U M T A T A: 11th FEB. 1931.

Before J.M.Young, President and R.D.H.Barry & O.M.Blakeway, Members of the Native Appeal Court (Cape and O.F.S.Division)

INTERPLEADER: CLAIMANT MUST PROVE TITLE: EXECUTION CREDITOR WHO PROVES THAT OWNERSHIP NOT IN CLAIMANT NEED NOT GO FURTHER - NOT ENCUMBENT O' EXECUTION CREDITOR TO PROVE PROPERTY IN DISPUTE BELONGS TO JUDGMENT DEBTOR.

(Appeal from the Native Commissioner's Court: Libode).

This interpleader action came before the Assistant Native Commissioner at Libode. Mandlangisa Mshiywa obtained a judgment against Madala Basi and on the 26th August 1930, a warrant of execution was issued. The Messenger attached certain cattle, four of which were claimed by the present Appellant, a Native woman, Sophia Basi, and an interpleader summons was issued.

The Claimant gave evidence to the effect that the cattle claimed are the progeny of an "Isipipo" beast given to her by her late husband and that they were in her possession at the time of attachment. The Assistant Native Commissioner found that the cattle in dispute were attached at the kraal of the late Basi, that the Claimant and the Judgment Debtor reside at this kraal, that the Judgment Debtor is the head of the kraal and that the cattle are not the property of the Claimant by reason of an "Isipipo" gift, and entered the following judgment:-

"Cattle declared executable with costs as far as claim "of Sophia is concerned".

In his reasons for judgment he says:-

" The Court was not bound to decide whether the cattle " were executable or not in the suit of Mandlangisa vs " Madala (vide page 120 Civil Practice of Magistrate's " Courts by Buckle and Jones 2nd Edition; the case of " Border and Allen versus Gowlett, 1911 O.P.D. 28; cited) " Judgment was entered in so far as Sophia, the Claimant " was concerned, leaving matters open for the intervention " of the estate or any other third parties concerned, no "Claim having been made on behalf of the estate or any "one else. Sophia herself contends that these cattle "are not estate cattle but her own".

It is common cause (a) that the animals in dispute were originally the property of the Claimant's husband, the late Basi. (b) that Peter Basi and not the judgment debtor, Madala Basi, is the heir of the late Basi, and (c) that Peter Basi absconded from his home in Pondoland many years ago and has never returned.

It has been contended on behalf of the Appellant that the animals were attached in her possession and that this fact raises the presumption that she is the owner of the animals and that the Assistant Native Commissioner did not

appreciate ..../

appreciate that consideration. It is also contended that the evidence led on behalf of the Respondent did not rebut that presumption and that, therefore, the Assistant Native Commissioner was wrong in the judgment which he gave. It is further contended that the onus of proving that the cattle were the property of the Judgment Debtor was on the Respondent and that he has failed to discharge that onus, and that in any event, whether th cattle are "Isipipo" cattle or not, the Claimant, as widow of the late Basi, is entitled to maintenance and support from such cattle until dispossessed thereof by the proper heir or by attachment in a legal suit against the said heir, the heir being Peter Basi or his estate.

Now, the Claimant led evidence first, which is the usual course in proceedings of this nature, and in that evidence the witnesses made statements, not only to the effect that the Claimant was in possession of the animals, but they went into details of what that possession was based on and to prove what title she relied upon to establish the dominium which she claimed. After hearing all the evidence before him the Assistant Native Commissioner was satisfied that it did not establish that the animals were "Isipipo" cattle and that the Claimant had any dominium in them and this Court is of opinion that that was the position at the conclusion of the case and it will not disturb his finding.

It has been contended on behalf of the Appellant that the execution creditor was obliged to prove that as a matter of fact the property attached belonged to the judgment debtor. This Court is not prepared to subscribe to this view. In the case of Hulumbe versus Jussob(1927 T.P.D. 1008) Tindall J. said:-

" It appears from the case of Grassis and Shrew vs. Lewis
" (1910 T.P.D. 533) that a Claimant must prove title
" himself. There Bristowe J. in giving judgment, after
" referring to the case of Beattie vs. Fennell (5.S.C.37).
said ' It is no doubt true that a Claimant in interpleader
'must prove title himself and that he cannot merely
'rely on the respondent's want of title, still the
'title required to be proved is not necessarily the
'dominium for in Jennings vs. Mather (I.K.B.1)
'a lien was held to be sufficient'. It is true
" that the claimant's possession raises a presumption of
" ownership in the claimant but if the execution creditor
"then succeeds in proving that the ownership as a matter
"of fact is not in the claimant and that she has no title,
"it seems to me that that is sufficient. It does not seem
" to be necessary for the execution creditor to go further
" then that; all he is called upon to do is to destroy the
" proof of ownership in the claimant. If he succeeds in
" doing that then the claim of the claimant for the property
" in question fails and the correct decision is to
" dismiss the claim".

Applying these principles to the facts of the present case, the appeal will be dismissed with costs, but the judgment of the Court below will be amended to one dismissing the claim with costs.

NO. 8.

MANXOTWE SIDUBULEKAN. VS. SIWEWE SOMYALO:

UMTATA: 11th February 1931.

Before J.M.Young, President, and R.D.H.Barry & O.M.Blakeway, Members of the Native Appeal Court(Cape and O.F.S.Division).

WIDOW OF NATIVE CUSTOMARY UNION: RIGHTS OF: HEIR RIGHTS OF: RESPECTIVE RIGHTS AND DUTIES OF WIDOW AND HEIR:

(Appeal From the Native Commissioner's Court:- Qumbu).

In the opinion of this Court the appeal must fail. The position of a widow of a customary union has been defined so often that it seems hardly necessary to repeat what has been said in the many cases on the subject. It might be as well, however, to refer to the evidence given by Col.Sir Walter Stanford in the case of Sekeleni vs. Sekeleni (21.S.C.118) where he said:-

"In the case of a Native dying and leaving a widow or widows, such widow or widows would not, under Native Custom, inherit any of the deceased's property. A widow would, with her children, come under the guardianship of her eldest son, if such son were of age. She would live with him, or at such place as he desired, and, during the time that she recognized his authority, it would be his place to provide her & her children with necessary maintenance in keeping with her position, lands to cultivate, and to lend her cattle with which to plough. She and her children would have to render him in return such services as are usually rendered by a wife to her husband, and by children to their father. The failure on the part of the woman or children to recognize the eldest son's authority would have the effect of depriving her, or them, of any claim for maintenance or support. But so long as they render him such services and behave dutifully towards him, they are entitled to maintenance out of the estate of the deceased, and, if the eldest son neglects to make sufficient provision for them, or otherwise illtreats them, an independent chief, upon sufficient grounds being shown, might have allowed the mother to establish a separate kraal, with stock taken from the estate for her maintenance, and under the guardianship of another guardian, usually a son or near relative. The woman would, however, only have the use of such stock the ownership still being vested in the son".

In the case of Rashule vs. Masixandu (5.N.A.C. 203) the President said:-

" It has been held by this Court on numerous occasions "to be indisputable Native custom that as long as she "remains at her husband's kraal, or has not deserted the "kraal, a widow is entitled to be properly maintained by "the heir, and to be consulted by him in the disposal of "the estate property. The estate devolves on the heir "who controls it and can dispose of it for the general "benefit of the family and the widow cannot claim to be "placed in possession of it or prevent the heir from "disposing of it provided she is maintained in a suitable "manner".

In the present case there is nothing on record to shew that the Defendant, who is the heir, has in any way exceeded his authority or omitted or neglected to fulfil his obligations. All he has done he was entitled to...../

to do. The two horses he disposed of were sold to liquidate some of the debts of the deceased. The Scotch cart has been hired out. This cannot, by any stretch of imagination, be regarded as an act which is detrimental to the interests of the widow or the kraal generally.

The loan of the horse by the Defendant, to his younger brother, even if such loan was made without the Plaintiff's consent, would not be a sufficient ground for complaint. For these reasons this Court is unable to sustain the first ground of appeal.

The second ground of appeal is against the award of costs against the Plaintiff personally and it is contended that the costs of the action should have been given against the estate.

The Defendant in the Court below is not entirely free from responsibility for the situation which has arisen for he has dealt with some of the estate property without reference to the Plaintiff who is entitled to look to him for maintenance out of the estate, and this might be considered as not being an unreasonable pretext for the Plaintiff coming to Court notwithstanding the demand in her summons went beyond what she was entitled to claim. Under the circumstances it appears to this Court that the costs of this action would more properly form a charge against the estate. To this extent the appeal is allowed. Costs in this Court and in the Court below to be borne by the estate.

1941 (T.N.) 14.

No. 9.

JAMES SOGAYISE VS. MORGAN MPAHLENI:

U M T A T A: 12th February, 1931.

Before J.M.Young, President, and R.D.H.Barry & O.M.Blakeway, Members of the Native Appeal Court(Cape & O.F.S.Division)

CONTRACTS: PROMISE BY MARRIED PERSON TO MARRY ANOTHER WHEN EXISTING MARRIAGE SHALL HAVE BEEN DISSOLVED AGAINST PUBLIC POLICY AND CONTRA BONOS MORES. DOWRY PAID IN CONSIDERATION OF SUCH PROMISE NOT RECOVERABLE.

(Appeal from the Native Commissioner's Court: QUMBU).

The Plaintiff in this case sued the Defendant in an action in which he claimed the return of six head of cattle (with their increase) paid by him on account of dowry for the Defendant's ward. The Plaintiff was a married man i.e, he had a wife to whom he was married by Christian rites at the time the dowry was paid. Both the Defendant and his ward were aware of this fact. It was agreed that the Plaintiff would obtain a divorce from his wife and when this divorce had been obtained he would marry the Defendant's ward both by Native Custom and by Christian rites. Steps were not taken by

the.../

the Plaintiff to obtain a dissolution of his marriage and the Defendant's ward broke off the engagement. The Plaintiff contended that because the marriage negotiations were broken off by the Defendant's ward, he was entitled to the return of the dowry cattle paid by him together with any increase. The Defendant denied liability and said that the agreement was an immoral one and against public policy. Judgment was entered for the Defendant with costs and the Plaintiff has appealed.

The case is in some respects similar to the case of Friedman vs. Harris (1928 C.P.D. 43) ;in that case Benjamin J.said:-

> "H. could only undertake to marry the Plaintiff if he "obtained a divorce from his wife, he at that time being, "as was well known to the Plaintiff, a married man. Now "such an undertaking is clearly illegal under our law as "being contra bonos mores. There are two cases in our "courts in which that point has been specifically considered. " I might refer to the later case of Staples vs. Marquard "(1915 C.P.D. at page 181) a decision by the present judge "President, the headnote of which is:'The promise by a "'married man to marry another woman when his existing "'marriage shall have been dissolved is against public "'policy. The ratification of such a promise, though made "'after dissolution of marriage, cannot be pleaded as a "'cause of action'.
> " That case virtually follows a similar decision by the "late Judge President in this Division in the case of "Kisly vs. Dreyer (1916 C.P.D. 603). I might just refer " to a passage in the judgment of the late Judge President "where he says: ' The contract of marriage is the most "'serious and important one that can be entered into, the "'most far reaching consequences to the community and the "'it to ensue on its completion; the law in most civilised "'communities rightly regards it with great respect, if "not reverence, and that a bargain should be made with "'a third party to receive money in order to bring about "'its dissolution is repugnant to the fundamental principles "'on which our common society has been built up and ought "'to remain established'".

It has been argued in support of the appeal that the dominium in the cattle has not passed to the Defendant, that he was not a party to the agreement, and that the Defendant's ward having withdrawn from the contract the Defendant was not entitled to retain the cattle and thus benefit by his wrongful act.

It is true that according to Native Custom the dominium in dowry cattle does not pass until the marriage or union is consummated but the payment of dowry cattle in advance is a well recognized practice and forms a very definite element in the negotiations for securing to the payer the girl he intends to marry. In this case the marriage was not only to be a customary union but also a marriage by Christian rites. It is clear from the authorities quoted above that the negotiations for a Christian marriage arose out of an immoral contract of which it was the clear intention of the parties that the preliminary payment of dowry should form an integral part. The contention that the Defendant was not a party to the agreement is untenable because it was incompetent for the girl, Sophia, to negotiate with the Plaintiff for the payment of dowry, this being solely within the province of her guardian, the Defendant.

The...../

The mere fact that Sophia refused to carry out the agreement does not minimize the share or part taken by the Defendant in such agreement. With regard to the contention that in circumstances such as those surrounding the present case the Defendant should not be permitted to benefit by his wrongful act, it must be borne in mind that this maxim of law is confronted by the far greater principle which has been enunciated in the case of Friedman versus Harris.

It is not apparent to this Court that any one judgment could be given in conformity with both these principles and the more important and far reaching one, which has already been stressed, must prevail; and it would seem the clear duty of Courts of law in dealing with cases such as the present one to refrain from doing anything which might tend to detract from this principle.

For these reasons this Court is not prepared to disturb the judgment of the Court below and the appeal is dismissed with costs.

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NO. 10. 1932 (E.D.N) 111.

BROWN AND DANIEL MTONGANE VS. STEPHEN BOOI.

KINGWILLIAMSTOWN: 17th April, 1931.

Before J.M.Young, President, & C.P.Alport & M.W.Hartley, Members of the Native Appeal Court(Cape & O.F.S.).

NATIVE COMMISSIONERS' COURTS - JURISDICTION - SECTION 10 (3) ACT 38 of 1927.- RESIDENCE - WHAT CONSTITUTES - TEMPORARY RESIDENCE. COSTS - COSTS OF INTERLOCUTORY PROCEEDINGS UNPAID- COURTS' DISCRETION.

(Appeal from Native Commissioner's Court: ALICE)

The parties to this case are Natives domiciled in the District of Victoria East. The Defendant, Daniel Mtongane, is the father of the Defendant Brown Mtongane. The latter is an unmarried man and, at the time the tort complained of is alleged to have been committed, was an inmate of the former's kraal.

The Plaintiff claimed eight head of cattle or their value £40, as damages for adultery, resulting in pregnancy alleged to have been committed by the Defendant, Brown, with his, Plaintiff's wife.

The Defendant took the following objections:-
(1) That the summons had not been properly served.
(2) That the Court sued in had no jurisdiction;
(a) as neither the first nor the second Defendant resided within the jurisdiction of the Court, and
(b) that Section 10 sub-section (3) of Act 38 of 1927, took the matter out of the jurisdiction of the Native Commissioner's Court of Victoria East.

The second objection was overruled and the first upheld. Fresh service was effected and, on the case being resumed, the following further objections were taken:

(1) That the costs of the previous objections remained unpaid.

(2)...That./

(2) That the Court sued in had no jurisdiction, inasmuch as the Defendant Daniel lived at Port Elizabeth and the Defendant Brown at Kimberley. Both these objections were overruled. The Defendants then denied the adultery and stated that in any case the claim was excessive and not in accordance with Native Custom.

The case proceeded and at the conclusion thereof the Native Commissioner entered judgment for Plaintiff for 2 head of cattle or their value £10 and costs of suit.

The Defendants have appealed on the grounds:-
Firstly, that the costs of the previous proceedings not having been paid, the Plaintiff is estopped from proceeding till such costs have been paid.
Secondly, that the Court sued in had no jurisdiction as neither of the Defendants resided within the District of Victoria East.
Thirdly, that the evidence does not support the finding of the Court.

With regard to the first ground of appeal, Wessels J.A. said in the case of Strydom vs. Griffin Engineering Coy (1927 A.D.552):-

> "It is quite clear from the cases cited that there is no "hard and fast rule as to when costs incurred in earlier "proceedings in a case must be paid before the litigant "is allowed to proceed further. If the non-payment of "the costs is vexatious, oppressive or male fide, the "Court will not allow the litigant to proceed before "paying the earlier costs. If there is a mere in- "ability to pay, the Court may grant its indulgence to "the Applicant; but, even where an inability to pay "exists and where there is no male fides or intention "to act vexatiously, the Court is still entitled to look "to all the surrounding circumstances and then in its "discretion to determine whether or not the earlier costs "should be paid".

In the present case there is nothing on the record to shew that the Plaintiff acted male fide or that there was any intention on his part to act vexatiously; and, having regard to all the surrounding circumstances, this Court is of opinion that the Native Commissioner correctly exercised his discretion in overruling the objection.

In so far as the second ground of appeal is concerned, the circumstances are as follows: The Defendant Daniel, whose kraal is situated at Trinity Mission within the jurisdiction of the Native Commissioner of Victoria East, has for the past eleven years been a member of the Police Force stationed at Port Elizabeth, where he was living at the time process was issued. In the case of Becker vs. Forster (1913,C.P.D. at page 967), Kotze J.said:-

> "The question of residence has frequently been the "subject of decision in our Courts, but none of the "decided cases are exactly in point. It has been laid "down that if a person resides in one district in the "sense of having his home there but is found staying "in another district, he cannot be sued in the latter "district. This is upon the ground that a temporary "visit does not subject the visitor having his home "elsewhere, to the jurisdiction. But this must not "be stretched too far, for cases may arise where a "person may have a recognised home elsewhere, yet the "length and nature of his visit in another place may be

"such..... /"

"such that it may become a question whether the Magistra-
"te of the place where he temporarily resides may not
"have jurisdiction over him; as in the case of a Member
"of Parliament coming to Cape Town on a lengthened visit
"during the session, or a resident from elsewhere taking
"a cottage at the seaside for the season, and sued on a
"local tradesman's bill. It is to be regretted that the
"act which creates and confers jurisdiction upon the
"Court of resident magistrate, has not also prescribed
"the length or character of the residence required
"to subject a Defendant to the jurisdiction. Again there are
"cases which lay down that a person may have more than
"one residence, and in such an event he will be liable
" to the jurisdiction of the magistrate of the district
"where he happens to be residing at the time of the
"proceedings against him".

In view of these remarks, this Court is of opinion that the Native Commissioner's Court of Victoria East had no jurisdiction over the Defendant, Daniel. He has more than one residence ; and, at the time process was issued, he was actually living or residing at Port Elizabeth. With regard to the Defendant Brown, the circumstances are different. It is clear from the record that, at the time proceedings were instituted he had not been long absent from his home. The length of his stay at Kimberley and the nature of his employment there were not such as to constitute residence and so oust the jurisdiction of the Native Commissioner's Court of Victoria East.

Dealing with the merits of the case, the only evidence of intimacy is that of the Plaintiff's wife. Certain letters alleged to have been written to her by the Defendant Brown, were put in. He denies that these letters were written by him or on his behalf, and there is no evidence to connect him with them. Moreover, he has declared on oath that he is unable to write. No attempt was made by the Plaintiff to rebut this statement. In the opinion of this Court that degree of corroboration which is essential in actions of this nature is lacking.

For these reasons the Appeal is allowed with costs and the Native Commissioner's judgment altered to absolution from the instance with costs.

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NO.11.

AMOS MLAKALAKA VS. PANDLE MAMKELI.

KINGWILLIAMSTOWN: 17th April, 1931.

Before J.M.Young, President, & C.P.Alport & M.W.Hartley, Members of the Native Appeal Court (Cape & O.F.S.).

EVIDENCE - BURDEN OF PROOF - ANIMALS - POUND REGULATIONS - WRONGFUL AND UNLAWFUL IMPOUNDING.

(Appeal from Native Commissioner's Court:Kingwilliamstown).

This is an appeal against the decision of the Assistant Native Commissioner, Kingwilliamstown, in an action in which he gave a judgment dismissing the Plaintiff's summons with costs.

The summons in the lower Court claimed:-

(1) "The....."/

(1) "The sum of £1 as damages sustained by the Plaintiff by reason of the Defendant, by himself or his agents or servants, having on or about the 21st December last wrongfully and unlawfully impounded certain nine head of cattle, the property of the Plaintiff, while the said cattle were lawfully upon the commonage used by the said Bongco's location inhabitants and the said Mlakalaka's location inhabitants in common and which said cattle were by the said Defendant or his agents or servants driven to and delivered to the Pound Master at Welcomewood."

(2) "The sum of 13/- being the amount of fees which Plaintiff was compelled to pay to the Pound Master aforesaid in order to effect the release of the said nine head of cattle so wrongfully and unlawfully impounded by the said Defendant".

In answer to this claim the Defendant through his Attorney filed a plea to the following effect:-

"Save and except that he admits having impounded certain nine head of cattle which Defendant states were wrongfully and unlawfully trespassing on his lands, Defendant denies the allegations in Plaintiff's summons contained and puts him to the proof thereof".

On these pleadings Mr.Cook on behalf of the Plaintiff, contended that the "right to begin" or "burden of proof" rested on the Defendant. The trial Court ruled against him whereupon he applied for and was granted leave to delete the following words from the Plaintiff's summons. "Which the said cattle were lawfully upon the "commonage used by the said Bongco's location inhabitants "and the said Mlakalaka's location inhabitants in common".

After the summons had been amended Mr. Cook again maintained that the "Onus Probandi" was on the Defendant, and that it was for him to prove "that the cattle "were found trespassing on his lands", as stated in his plea. The Assistant Native Commissioner ruled that the "burden of proof" was on the Plaintiff and that in order to succeed he must prove "that the impounding was wrongful and unlawful." Mr. Cook declined to lead any evidence and the summons was dismissed with costs.

Now in deciding this appeal it is necessary to consider what is the substantive fact to be made out and on whom it lies to make it out?. In other words what is the matter in issue? Who brought it into question? It is common cause that the animals were impounded. The Plaintiff alleges that the impounding was wrongful and unlawful. If this allegation were struck out of his summons he would fail. It follows therefore that the substantive fact to be made out was that the Defendant had been guilty of a wrongful or unlawful act. The burden of proving this was on the Plaintiff.

For these reasons this Court is of opinion the Assistant Native Commissioner correctly ruled that the burden of proof rested on the Plaintiff and when no evidence was led he had no option but to dismiss the summons.

The Appeal is dismissed with costs.

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NO. 12.

RICHARD MBAMBO VS. JACK SWAAI.

KINGWILLIAMSTOWN: 17th April, 1931.

Before J. M. Young, President, & C.I.Alport & M.W.HARTLEY, Members of the N. A. C. (CAPE & O.F.S. DIVISION).

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NATIVE CUSTOM - PRACTICE - KRAAL-HEAD RESPONSIBILITY - JOINDER: KRAAL-HEAD WITH TORT FEASOR - DEFAMATION, NO ACTION FOR UNDER NATIVE CUSTOM, UNLESS AGGRIEVED PERSON HAS BEEN ACCUSED OF BEING A SORCERER OR PRACTISING WITCH-:CRAFT - PRINCIPLES OF SOUTH AFRICAN LAW APPLY.

(APPEAL FROM THE NATIVE COMMISSIONER'S COURT: PORT ELIZA-:BETH)

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The Plaintiff in this case sued the Defendant for the sum of £25 as and for damages sustained by him by reason of the Defendant's daughter, Nongqele Swaai, having uttered certain false, malicious and defamatory words of and concerning the Plaintiff's wife.

The Defendant excepted to the Plaintiff's claim on the grounds: (1) That Nongqele Swaai is not the daughter of the Defendant; or, if the Court finds that she is his daughter, (2) that she is an illegitimate daughter and, according to Native Custom, he is not responsible for the delicts of an illegitimate child.

The Assistant Native Commissioner found that Nongqele Swaai is the illegitimate daughter of the Defendant, that for the past three to five years she has lived on and off at the Defendant's house and has regarded it in every way as her home and that the Defendant supports her and treats her as his daughter and a member of his household. He overruled the first exception and upheld the second and dismissed the summons with costs. In his reasons for judgment he says "The authority relied on in deciding this exception was the case of Takayi vs. Mzambalala (1.N.A.C. 21) which lays down:-

"The ownership of children born by unmarried women vests "in the guardians of such women, unless the natural father "shall have paid such guardian the full fine claimable "under Native law for the pregnancy of such woman, and a "beast for the maintenance of the child born of such "illicit intercourse".

"There is nothing in the evidence to show that Defendant "paid such fine or maintenance, thereby acquiring ownership "of the girl Nongqele and rendering himself liable for "her tortious acts and the exception was therefore upheld "with costs".

An appeal has been brought on the following grounds:-

1. "That after the hearing of the evidence adduced at the "trial on the first exception the presiding Commissioner "overruled the exception, holding that Respondent was the "father of Nongqili Swaai."

2. "That the presiding Commissioner was wrong in upholding

"the...../"

"the second exception, because it was proved beyond any "doubt, that at the time the tortious act was committed "by Nongqili Swaai, she was actually residing with "Respondent for several years, and consequently the "Respondent is liable under Native law for the tortious "acts committed by any inmate of his kraal".

The relationship of the girl Nongqele Swaai to the Defendant is a factor which does not affect the application of the custom of "kraalhead responsibility". If she was an inmate of the Defendant's kraal at the time of the commission of any tort or actionable wrong, the Defendant ,as head of the kraal, is liable. In the case of Mehlomane vs. Nkwatsha (1.N.A.C. 33) the President of the Native Appeal Court said:-

"As to the responsibility of the head of a kraal for acts " of a youngman living with him each case must be dealt "with on its merits. In the present case Cayane was a "year or more with Appellant. As far as the neighbour- "hood could see, his home was at Appellant's".

and in the case of Rubulana vs. Tungana (1.N.A.C. 90) Mr. A.H.Stanford in giving judgment said :-

"Under Native law and Custom the head of the kraal is "liable for any torts which may be committed by members "of his kraal.....The position of the head of the "kraal insuch cases is not that of a wrongdoer but "rather that of a surety responsible for the good "behaviour of the members of his kraal".

In cases where it is sought to hold the kraal-head responsible for the delicts of inmates the correct procedure is to cite the person who actually committed the tort and join the head of the kraal, and to allege that, at the time the tort was committed, the tort feasor was an inmate or member of the kraal and, that for that reason, the kraal-head is responsible.

The present case is one for damages for defamation and it is quite clear that the action is brought under Native Custom. Now according to Native Custom the person of each individual was the property of the chief and any injury to the person or character of such individual was an offence against the chief, punishable, as a crime, by fine. The chief might, as an act of grace, award a portion of the fine to the injured person, who however, had no right of action for damages. It follows then that the Plaintiff cannot succeed in the action in its present form. If he or his wife have been wronged by the Defendant's illegitimate daughter any action to remedy that wrong can only be maintained under the common law of South Africa.

For these reasons, although the Appellant is right in his contentions, this Court feels that the interests of justice will best be met by a dismissal of the appeal and that there be no order as to costs.

The appeal is accordingly dismissed. No order as to costs.

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NO.13.

MLUNGULWA NJEMLA VS. MLUNGU MFIKWA

BUTTERWORTH: 4TH JUNE, 1931.

Before J.M.YOUNG, President, & H.E.F.WHITE & E.F.G.MUNSCHEID, Members of the Native Appeal Court(Cape and O.F.S.Division).

CONTRACT, PERFORMANCE OF. LAND-SELLER, DUTIES OF. TRANSFER OF ARABLE ALLOTMENT IN SURVEYED DISTRICT, APPROVAL OF CHIEF MAGISTRATE REQUIRED.

(Appeal from the Native Commissioner's Court: TSOMO).

The Plaintiff sued the Defendant in an action in which he claimed an order on the Defendant to pass and execute transfer of a certain arable allotment, being Lot No.11, location No.-, Mfula, District of Tsomo, or in the alternative the payment of £50, as damages.

In his particulars of claim he alleged that about the year 1925 the Defendant approached him with regard to the lot in question, the title deed of which was on the point of being cancelled owing to the fact that the Defendant was in arrear with his quitrent, and that it was agreed that, in consideration of the payment of all arrear quitrent and taxes by the Plaintiff, the Defendant would pass transfer of the lot to Plaintiff's son, Mzamo, on his marriage. He alleged further that, in pursuance of the agreement, he paid the quitrent on the said lot for the years 1915 to 1929 inclusive, amounting in all to the sum of £16. 10. 0, also the sum of £5.14.6, other taxes due by the Defendant, and that his son Mzamo is now married but the Defendant neglects to perform his part of the agreement.

In his plea the Defendant denied the alleged agreement and said that, in consideration of the payment by the Plaintiff of the sum of £8, taxes owing to the Defendant, he Defendant, agreed to allow the Plaintiff to use the lot for a period of four years, that the Plaintiff advanced the sum of £8, and used the lot. He pleaded further that one of the conditions of the title deed issued in respect of the said lot reads:-

"The piece of land hereby granted shall not be alienated "or transferred except with the consent of the "Chief Magistrate first had and obtained", that the consent of the Chief Magistrate had not been obtained and the Plaintiff's action was therefore premature, even if the agreement of sale had taken place.

After evidence had been led on behalf of the Plaintiff and the Defendant had closed his case without calling any evidence the Assistant Native Commissioner entered judgment for the Plaintiff "For the transfer of the land in question or £16: 15:, damages and costs".

The Defendant has appealed, firstly, on the ground that the Plaintiff has failed to prove that any

agreement...../

agreement to transfer was entered into; and, secondly, that the land in dispute is not capable of being alienated or transferred without the consent of the Chief Magistrate first had and obtained, and that it is admitted that such consent has neither been sought nor obtained.

On the first of these grounds there is no evidence whatsoever to rebut that of the Plaintiff supported by the numerous quitrent and other receipts produced by him; and, in the opinion of this Court, the Assistant Native Commissioner correctly accepted his testimony that the agreement alleged by him had been concluded.

The principle involved in the second ground of appeal was considered in the cases of Payn versus Lokwe, heard in the Circuit Court at Umtata in 1911 (not reported), Sisuse versus Mxatule, (5N.A.C. p.86). Mbulawa versus Bunge, (5N.A.C. p.87), and Stieger versus Selling (1915 N.I.R.609). In each of these cases it was held that it is the duty of the seller to place himself in a position to give transfer, and it is no defence in an action to compel transfer to say that the consent of the proper authority to such transfer or alienation has not been obtained when that fact is due to the seller's own fault.

In the present case it was the Defendant's duty, as the registered holder of the allotment, to approach the Chief Magistrate, through the proper channel, with a view to obtaining his approval to the transfer. This he has failed to do.

For these reasons the appeal will be dismissed with costs but the judgment of the Court below will be amended to read:- "The Defendant is ordered to take the "necessary steps to seek approval of transfer; or in the "alternative to pay the Plaintiff the sum of £16.15.0, "by way of damages and costs".

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NO. 14.

NGANGOMHLABA SIGCAU VS. SAHLUKO TUNDA.

BUTTERWORTH 4TH JUNE, 1931

Before J.M.YOUNG,President,& H.E.F.WHITE & E.F.G.MUNSCHEID. Members of the Native Appeal Court(Cape and Orange F.S.DVSN)

NATIVE CUSTOM: " NQOMA ", AKIN TO "PRECARIUM" - SPOLIATION.

(Appeal from the Native Commissioner's Court, Willowvale).

The facts in this case are that the son of a commoner named Cetywayo Jebe seduced the sister of the Appellant, who is the paramount chief of the Amagcaleka, that the Appellant sent his messengers to "eat up" Cetywayo's kraal and that certain sheep, the property of the Respondent which were in the care of Cetywayo under the custom of Nqoma, were seized. From the evidence of

Cetywayo...../

Cetywayo it appears that these sheep were taken against his wish and that he informed the messengers that they belonged to the Respondent, who now seeks to recover them by way of a spoliatory action. This action is available only to persons in legal possession of property spoliated whilst the property owner may have recourse to a vindicatory action against the world at large.

The question to be decided therefore is whether the Respondent, having delivered the stock to Cetywayo under the custom of "Nqoma", had such possession as would entitle him to an action for spoliation.

In the opinion of this Court the custom of "Nqoma" is akin to the contract of precarium rather than that of commodatum and that the stock is lent only during the pleasure of the lender and can be redemanded at any time. The Court is also of opinion that as long as the person to whom the "Nqoma" is made has the actual physical possession of the animals the owner is divested of all legal possession, and, although he has the right to vindicate the stock wherever he may find it, he cannot claim to be placed in possession of it by means of a spoliatory action. The proper person to institute this action is the person who has the actual physical and legal possession of the property spoliated.

For these reasons the appeal is allowed with costs and the Native Commissioner's judgment is altered to one dismissing the summons with costs.

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NO.15.

WILLIE XOLO VS. NOWAYILE XOLO

BUTTERWORTH: 4TH JUNE, 1931.

Before J.M.Young,President, & H.E.F.White & E.F.G.Munscheid, Members of the Native Appeal Court(Cape & O.F.S.Division).

NATIVE CUSTOM - PROPERTY ACQUIRED BY WIDOW - WHERE NATIVE CUSTOM CONFLICTS WITH JUSTICE AND EQUITY IT MUST GIVE WAY.

Respondent, a widow, sued Appellant (heir of her late husband) for delivery to her of certain property acquired by her after the death of her husband and whilst still an inmate of his kraal.

Judgment was entered in her favour and appeal is brought against this judgment.

(Appeal from the Native Commissioner's Court: Kentani).

Under Native Law and Custom as administered by the Native Chiefs it was not competent for the widow of a customary union to acquire and hold property in her own

right...../

right, but in the case of Nolanti versus Sintenteni (N.A.C.1.p.43) it was held that, where Native Custom is repugnant to justice and equity and the special provisions of the Proclamations for the government of the Native Territories, it must give way, and that a widow, after the death of her husband or partner, was free of all control and entitled to retain in her own right all property she may have acquired since her husband's death.

In the present case the Plaintiff is a widow and the property claimed by her was earned by her during her widowhood. It is true that she is still an inmate of her late husband's kraal and that the stock in dispute was acquired by her while resident there, but there is nothing to prevent her from leaving that kraal and taking up her abode elsewhere or to justify the action of the Defendant in withholding her earnings.

The appeal is dismissed with costs.

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NO.16.

MADONDILE ZENZILE VS. ZENZILE HELEM.

U M T A T A: 10TH JUNE, 1931.

Before J.M.Young,President,& O.M.Blakeway,& E.W.Wilkins, Members of the Native Appeal Court(Cape and O.F.S.Division).

PROCEDURE, COURT CANNOT ADJUDICATE TWICE OVER ON SAME ISSUE. COSTS, AWARDING OF ON SUCCESSFULLY PLEADED ISSUES - DISCRETION OF COURT - CLAIMS IN CONVENTION AND RECONVENTION.

(Appeal from the Native Commissioner's Court: Umtata).

In this case the Plaintiff claimed 12 head of cattle from the Defendant. The Defendant is Plaintiff's eldest son in the latter's right hand house.

To the Plaintiff's claim the Defendant pleaded:-

(a) That 8 of the cattle belonged to the right hand house,

(b) That the remaining 4 were his own private property.

He counterclaimed a declaration of rights:-

(1) That 8 of the cattle belonged to the right hand house.

(2) That the remaining 4 were his own property.

The Plaintiff(Defendant in reconvention) pleaded

to...../

to the counterclaim denying the contentions of the Plaintiff in reconvention.

It is difficult to see what useful purpose the Defendant sought to achieve by raising a counterclaim which simply repeated the identical issues raised in the claim in convention. The plea to the counterclaim again is little more than a repetition of the reply to the plea.

After hearing a great deal of evidence the Court found for the Plaintiff for the 8 head and there is ample evidence to support the Native Commissioner's able reasoning and convincing analysis of the evidence on this point. Judgment for the Defendant was entered in regard to the 4 head and the Native Commissioner then went on to give a judgment in reconvention which merely duplicated his judgment in convention, save that, in convention, Defendant was ordered to pay costs while in reconvention no order was made as to costs.

Except for the filing of the actual counterclaim and the plea thereto the whole of the proceedings, fall within the scope of the enquiry required by the issues raised in convention. Reading the record it is impossible to define any part thereof as appertaining entirely and separately to the counterclaim only. This must necessarily be so seeing that the so-called counterclaim raises no new or separate issue. There were therefore no costs of any consequence incurred in reconvention and the order of the Native Commissioner appears to have been the only one possible. This disposes of paragraph 4 (b) of the grounds of appeal.

It is an elementary principle of procedure that a Court cannot be asked to adjudicate twice over on the same issue. The fundamental exceptions and objections of "lis pendens" and "res judicata" amply demonstrate this. Had Plaintiff objected to the counterclaim as raising no fresh issue and as being a mere repetition of the case already before the Court there is little doubt but that the counterclaim would have been expunged at that stage. The Plaintiff's omission or neglect to take this course did not however compel the Court to concern itself with or countenance a redundant claim and one, moreover, for which no justification existed either in law or in Equity - (Vide numerous decisions on a Court's inherent power to prevent any abuse of its functions or to discountenance unnecessary prolixity in pleading). The more correct judgment in reconvention would have been to have simply dismissed the counterclaim. The rights of the parties to all the cattle in dispute having been definitely pronounced upon in convention there was nothing left to be decided upon in reconvention.

The Defendant appeals:-

(a) against the award of the 2 head of cattle to the Plaintiff.

(b). against the award of costs to the Plaintiff in convention in respect of that portion of the claim (the 4 head) on which the Plaintiff failed,

(c).../

(c) against the judgment of no order as to costs in reconvention.

For the reasons above given the appeal fails in regard to grounds (a) and (c).

There is, however, much to be said for contention (b). The ordinary rule of law is that the Plaintiff should have the costs of the issues on which he succeeds and that the Defendant should get the costs of issues successfully pleaded and proved by him - (See opening words of the judgment by de Villiers C.J. in Fripp vs. Gibbon and Coy.1913 A.D.357).

This rule is one easier to state than to apply and is subject to many exceptions dictated by particular circumstances. Where the issues are inextricably interwoven and it is difficult, if not impossible, to "wholly" allocate any particular item, to any particular issue the party mainly successful will be entitled to a general order for costs in his favour. (Pelser vs. Levy 1905 T.S.).

In this case the Defendant's plea at once divided the case into two main issues; namely:- the origin of the 8 head and the origin of the 4 head. The Plaintiff's contention for a common origin for the whole 12 head failed. As pointed out by the presiding officer himself in his reasons the case developed along two main lines of enquiry; and, in dealing with the question of costs in convention, his reasoning does not seem altogether sound when he seeks to re-amalgamate the proceedings into one issue for the purpose of costs. If it can be shown that evidence was called and expense incurred solely in regard to the 4 head the successful party on that issue should surely have his costs.

The Appellant's contention in paragraph 4 (a) of the grounds of appeal is correct in principle (Clarke vs. Bethal Co-operative Society.1911 T.P.D.1152) and should succeed if he can apply this principle to the facts of this case so as to have some material effect. (Van Staden Bros vs. Botha, 1928 C.P.D.264).

An Appeal Court will not go out of its way to upset a Magistrate or Native Commissioner on a subsidiary question like costs unless there has been a clear injustice, or there has been a clear violation of some definite legal rule, and then only if the effect of the mistake in the trial Court has been of some material consequence to the party aggrieved. (Fripp vs. Gibbon and Coy. supra).

The Appellant has shown that there were witnesses called wholly and solely on the question of the 4 head of cattle, and, in the opinion of this Court, he is entitled to a variation of the order as to costs, and this is amended to read " Defendant to pay all costs except the expenses of those witnesses specially called on the issue raised in paragraph 2 of the plea in convention in respect of animals Nos,7,8,10 and 11". The appeal on all other points is dismissed.

Coming...../

Coming now to the costs of appeal we find the Respondent successful to a far greater extent than the Appellant. On the other hand paragraph 4 (a) of the grounds of appeal was a definite issue raised by the Appellant and the Respondent has contested it. He was faced by the difficulty that the Rules do not permit of a party varying a judgment, but he might have offered to abandon these costs. (Order XIX Rule 6). His failure to do so has forced the Appellant to come to the Appeal Court to adjust a grievance which it has found of sufficient consequence to justify an appeal. Here again, however, the rule applies that the Respondent should get the costs on appeal of those issues on which he has succeeded. (The case of Clarke vs. Bethal Co-operative Society above quoted has a clear application). The theoretically correct judgment would be "Respondent to have the costs of appeal on those issues on which he has succeeded and Appellant to have the costs of appeal on the one issue on which he has succeeded". The practical effect of this would be that the two sets of costs would almost cancel out. This brings this Court to the conclusion that each party should have his own costs of appeal, and it is ordered accordingly. The Appellant cannot complain at being made to pay the costs which he forced the Respondent to incur in coming to the Appeal Court to contest, the questions raised in paragraph 1,2,3 and 4 (b) of the grounds of appeal. The Respondent cannot complain at being made to pay the Appellant's costs incurred in coming to the Appeal Court to get relief on what the Appeal Court has decided to be a material item (4.a).

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NO.17.

MAMADWALAZA STEPULA VS. ZIBANA STEPULA

K O K S T A D: 24th JUNE, 1931.

Before J.M.YOUNG, President, & R.J.MACLEOD & W.H.P.FREEMANTLE, Members of the Native Appeal Court(Cape & O.F.S.Division).

NATIVE COMMISSIONERS' COURTS: TRANSKEIAN TERRITORIES: JURISDICTION: INTERDICTS: ORDERS MADE EX PARTE CAN ONLY BE OF A TEMPORARY OR RESTRAINING NATURE, AND CAN ONLY BE AIMED AT MAINTAINING THE STATUS QUO BETWEEN THE PARTIES PENDING PROCEEDINGS TO ESTABLISH RIGHTS BY WAY OF A TRIAL ACTION.

(Appeal from the Native Commissioner's Court:MATATIELE)

This case discloses a somewhat unique state of affairs. Alleging himself to be the owner of certain stock in the possession of the Respondent the Appellant, now Respondent, obtained an ex parte order directing the messenger of the Native Commissioner's Court of Matatiele to forthwith attach and seize the stock in the possession of the Respondent in the Court below (Appellant in this Court)

and...../

and hand it over to the Applicant. The order went on to call upon the Respondent at a later date to shew cause why such order should not be confirmed. On the return day the Respondent objected to any order of so drastic a nature having been made against her in her absence and without her side of the matter having been heard. She also resisted the messenger when he went to attach the stock.

It becomes necessary to enquire upon what authority the original ex parte order was made. The jurisdiction of a Native Commissioner in Civil suits is laid down in section 10 of Act 38 of 1927. This section is general in its terms, and to ascertain the extent of its application in the Transkeian Territories assistance can be derived from the Rules of procedure applying to Courts of Native Commissioners. These Rules are contained in the second schedule to Proclamation 145 of 1923, and are identical with the Rules applying to Magistrates' Courts in the Territories. Order XXI provides for the granting of interdicts and from this it may be inferred that the terms of section 10 of Act 38 of 1927 include the right to grant an interdict.

Act 32 of 1917 contains, in Order XXII, provisions similar to those of Order XXI, of Proclamation No.145 of 1923. In commenting on interdicts under the Act (Act 32 of 1917) at page 45 of the second edition of Buckle and Jones, the authors point out that section 30 of the Act and therefore Order XXII applies only to interdicts pendente lite The same would hold good of Order XXI of the Proclamation.

It is clear that the whole intention of the Rules of Procedure is that all disputes must be settled by way of a trial action and viva voce evidence, subject to cross-examination. There is nothing to justify the conclusion that this procedure can be departed from in any case where a permanent remedy is sought. Form No.20 annexed to the Proclamation makes it clear beyond doubt that the ex parte procedure can only be used to obtain an order of a temporary and restraining nature, and that such order will only be granted upon the assumption that the rights of the parties are to be decided by a trial action. It is also clear that, even in temporary interdicts, nothing final is to take place until the return day, after the Respondent has been heard. Even in the case of a Mandament van Spolie there is no authority for the contention that, save in the most exceptional circumstances, any order could be made for the attachment of the property until the return day. All that an Applicant can ask for in the ex parte application is an order restraining the Respondent from dealing with the property pending the return day of the order.

An interdict is a special form of remedy to be granted with caution to suit special circumstances of urgency, and to prevent irreparable damage so that, even if it is satisfied with the urgency of the matter, the Court may still require the Applicant to give security. (Section 2 of Order XXI of the Proclamation). The remedy is not one to be encouraged or lightly granted.

In the present case the ex parte order does not comply with Form 20; it does not order the Applicant

to..../

to institute any action; it grants the Applicant, in advance, a form of relief to which he would only be entitled after a trial action. The order is irregular and the Assistant Native Commissioner, in granting it, went beyond the scope of his jurisdiction. The order not being a lawful one in its original form could not be made final at any later stage. Even if the original order were sound the Court should not have made it final on the return day in view of the conflicting affidavits then before it. See case of Frank vs. Ohlsson's Cape Breweries Ltd.A.D. 1924 at page 2a4, where Innes C.J. in giving judgment said :- "It is a general rule of "South African practice that when the facts relied upon "are disputed an order of ejectment will not be made on "motion; the parties will be ordered to go to trial. The "reason is Clear; it is undesirable in such cases to "endeavour to settle the dispute of fact upon affidavit. "It is more satisfactory that evidence should be led "and that the Court should have an opportunity of "seeing and hearing the witnesses before coming to a "conclusion".

It would seem therefore that:-

(a) No ex parte order can be one other than of a temporary or restraining nature.

(b) The order can only be aimed at maintining the status quo between the parties pending proceedings by the Applicant to establish his rights by way of a trial action.

(c) Before granting such an order the Court must be satisfied that urgent and cogent reasons exist for it.

(d) Where the order is likely to cause some loss to the Respondent the latter should be safeguarded by the enforcement of section 2 of Order XXI of Proclamation 145 of 1923.

The appeal is allowed with costs and the judgment of the Court below altered to one discharging the order with costs.

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NO. 18.

SEKAKE THAMAE VS: ELLIOT MOKHELE.

K O K S T A D: 24th JUNE, 1931.

Before J.M.YOUNG,President, & R.J.MACLEOD & W.H.V.FREEMANTLE, Members of the Native Appeal Court(Cape & O.F.S.DIVISION).

APPEAL: EVIDENCE: RIGHT TO BEGIN: NO APPEAL LIES FROM A RULING GIVEN BY A COURT ON A POINT OF EVIDENCE,APART FROM THE FINAL DECISION ON THE MERITS.

(Appeal...../

(Appeal from the Native Commissioner's Court: Mt.Fletcher)

This is an appeal from a ruling given by the Native Commissioner of Mount Fletcher in an Interpleader action.

Elliot Mokhele obtained a judgment against Peter Thamae and on the 27th October 1930, a warrant of execution was issued. On the 6th November 1930, the messenger attached 16 head of cattle which were found in the possession of the judgment debtor's mother. These were all claimed by Sekake Thamae and an Interpleader summons was issued.

The judgment debtor, Peter Thamae, and the Claimant, Sekake Thamae, are brothers. The former is the eldest son and heir of his late father, and some of the cattle claimed are the dowry cattle of his sister Koselia.

Before any evidence was led it was contended by the claimant that the stock was attached whilst in the possession of the judgment debtor's mother and that, therefore, the onus of proof was on the judgment creditor and that it was his duty to begin. The judgment creditor maintained that the cattle, when attached, were in the possession of the judgment debtor and that it was the duty of the claimant to begin.

Certain evidence was led, and on this evidence, the Native Commissioner ruled that the burden of proof was on the Claimant. No mention was made as to costs. The case was then postponed, costs to be costs in the cause

The claimant has appealed on the grounds that the Native Commissioner was wrong in finding that the onus of proof rested on the claim/(Appellant) and /:ant/ that costs should have been awarded to the claimant (Appellant).

Mr. Gundry, for Respondent, objects to the hearing of the appeal on the ground that the ruling of the Native Commissioner is not such a judgment rule or order or decision as is referred to in section 73 of Proclamation No.145 of 1923 and particularly such rule or order as is referred to in paragraph (ii) (b) of the said section, and that, therefore, no appeal lies from the said ruling.

In the opinion of this Court the objection is a good one and must succeed.

The question of the test to be applied to ascertain whether an order has the effect of a find or definitive sentence was fully considered in the case of Steytler versus Fitzgerald (1911 A.D.235). In that case Innes, late Chief Justice laid down the test in the following terms:- "When an order incidentally given during the progress of litigation has a direct effect on the final issue when it disposes of a definite portion of the suit, then it causes prejudice which cannot be repaired at the final stage, and in essence it is final though in form it may be interlocutory". This test has been employed in most of the subsequent cases. Dealing with what is meant by prejudice in such a case Bristowe J. said:-

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"Taking this as a test, then in order to be appealable, an interlocutory decision must be one which is irreparable, not in the sense that the effect which it produces cannot be repaired having regard to the resources at the command of the persons against whom it is made, but in the sense that (if it remains unreserved) it irreparably anticipates or precludes some relief which would or might have been granted at the hearing". (Mears vs. Nederlandsch Z.A.Bank 1908 T.S. 1142). In the case of Dickinson and another versus Fisher's Executors (1914 A.D. at page 427) it was held that when a dispute arises as to the right to begin and the Court decides it, that decision, though it may be of considerable practical importance is not an order from which an appeal could under any circumstances lie, apart from the final decision on the merits.

For these reasons the appeal is struck off the roll with costs.

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No. 19.

QALANE KIBI VS. PIDISO AROSI

U M T A T A 8th Sept. 1931.

Before R.D.H.BARRY, President, & R.H.WILSON & E.W.WILKINS, Members of the Native Appeal Court (Cape & O.F.S. Division)

COSTS: SUCCESSFUL PARTY NOT TO BE DEPRIVED OF ON GROUND THAT THE EVIDENCE ADDUCED ON A POINT NOT IN ISSUE WAS BELIEVED TO BE UNTRUE.

(Appeal from the Native Commissioner's Court; UMTATA)

In this case the Plaintiff sued the Defendant for £5 - 15 - 0 cash lent; the plea was a bare denial.

The Court below gave judgment for Plaintiff and ordered each party to pay his own costs.

Against this judgment, in so far as the order in respect of costs is concerned, an appeal has been noted on the following grounds:-

1. That Plaintiff, having succeeded in the issue before the Court and having obtained judgment for the amount claimed by him, was entitled to an order awarding him costs.

2. That the suit became necessary owing to the defendant's denial of the debt, which denial was not accepted by the Trial Court.

3. That even if the Court disbelieved Plaintiff on a point not in issue, nor material to the case, he should not have been deprived of his costs.

4. That there was no call on the Court to decide, nor express any opinion on the case pending between Dyubele and Plaintiff, more especially as in that case all pleadings are filed and the case is due for hearing in September. Further that any penalty for non-acceptance of evidence of either party in that case, would be a result or consequence of the judgment therein and should not be awarded now.

5. That the award of the Court on the question of costs was not a judicial exercise of its discretion and was wrong.

A cross-appeal has also been noted on the ground that the onus in this case was on the Plaintiff and that in view of the Magistrate's finding on the facts proved by the Defendant and which deprived the Plaintiff ot his costs, the Magistrate erred in finding for him on his claim, as he disbelieved Plaintiff on material points and should have, therefore, rejected his evidence in toto.

To deal with the cross-appeal first. The judgment has been attacked on two grounds viz:-
(a) That the Additional Native Commissioner disbelieved the evidence of the Plaintiff when his credibility was tested in the course of questions put in regard to a case pending between the Plaintiff and another man named Dyubele.
(b) That there is a discrepancy between the evidence of Plaintiff and his only witness, Manundu Piyosi.

As regards (a), the facts appear to be that a case is at present pending between the Plaintiff and one Dyubele Nkohla, and Plaintiff was, in the opinion of this Court, placed in a difficult position by being cross-questioned on facts connected with a pending case, and the not unnatural course for him to adopt was to refrain from making statements in the present case which might either rightly or wrongly stultify him in the prosecution of his claim against Dyubele Nkohla.

This Court considers that undue importance was, in the circumstances, attached to the conclusion come to that Plaintiff was not telling the truth on a point not in issue. And it is even not beyong the range of possibility that when the evidence is heard in the case pending between Plaintiff and Dyubele Nkohla, that a decision may be come to not inconsistent with the Plaintiff's testimony in the present action.

As to (b) This Court is of opinion that the one and only discrepancy between the Plaintiff and his witness, Manundu Piyosi, is not such as to vitiate the whole proceedings; indeed, it is not improbable that the divergence is more apparent than real.

The Additional Native Commissioner found as a fact that the money was borrowed by the Defendant from the Plaintiff and he disbelieved the Defendant on this point. For these reasons this Court has come to the conclusion that the cross-appeal must fail.

For the same reasons and bearing in mind also that the Additional Native Commissioner has found

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for Plaintiff for the full amount claimed, that the Plaintiff was forced to take legal action to vindicate his rights, and seeing that the Additional Native Commissioner entirely disbelieved the Defendant on the main issue, the Plaintiff should not have been deprived of his costs.

The cross-appeal is dismissed with costs and the appeal is allowed with costs and the judgment in the Court below altered to: "Judgment for Plaintiff as prayed with costs of suit".

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NO.20.

NOKITI LANDE VS. NOTEKI LANDE

U M T A T A: 8th Sept. 1931.

Before R. D. H. BARRY, President; E.M. JENKINS & A.G.McCLOUGHLIN, Members of the Native Appeal Court (Cape & T. S. Division).

WIFE: WIDOW: EARNINGS OF, - BELONG TO HUSBAND'S ESTATE. CREDIBILITY: LEGAL COGNISANCE TAKEN OF TESTAMENTARY DOCUMENT NOT FORMING PART OF RECORD:

(Appeal from the Court of Native Commissioner: ENGCOBO)

In this case the Plaintiff sued the Defendant, according to the summons as amended by consent, for 16 head of cattle or their value £80.

The Plaintiff sues as widow of the late Kafile Lande, and the Defendant is a son of Kafile by the Right hand house. It is common cause that the cattle claimed are the progeny of stock earned by the Plaintiff on the farms. It is admitted by Plaintiff that the Defendant handed to her one beast which died, thus reducing the number in dispute to 15.

The Assistant Native Commissioner gave judgment for the lesser number or their value £75, and against this judgment an appeal has been noted on the following grounds:-

(1) That the judgment is against the weight of evidence;
(2) That there is no corroborative evidence of the Plaintiff's statement that her marriage with the late Kafile was dissolved.
(3) That Plaintiff regarded the Defendant as the owner of the cattle by reason of the fact that she admitted that he had ngomaed one of the cattle to her.
(4) That the earnings of a widow during the existence of a marriage belong to the husband.
(5) And that the Native Commissioner went beyond the record in stating in judgment that by a will of Kafile Lande his great house and a minor house had been disinherited since there was no legal evidence on record as to the contents of the will.

There are other so-called grounds of appeal put forward, but they are mere arguments and do not merit reference. The sole point to be determined is whether the cattle formed part of the estate of the late Kafile.

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It is common cause that the Plaintiff left her husband about 1885. She did not return until the Boer war, when she brought the original cattle which admittedly were her earnings.

In evidence the Plaintiff states that she returned after her husband was dead and left the cattle at Edmund's kraal and from there they were taken to the Defendant. She is not able to deny that Kafile died in 1913, but in a previous case she stated in the course of her evidence that her husband died shortly after she came to Engcobo. Ben Lande supports Plaintiff and states that she returned in 1913 or 1914, but he is not in a position to give first hand evidence as to the reason why the Plaintiff left her husband. The Defendant states that Plaintiff was at home for two years before Kafile died, but he too is unable to state why Plaintiff left Kafile.

This Court is of the opinion that the evidence led as to the dissolution of the marriage by native custom between the Plaintiff and Kafile is entirely inconclusive. Moreover, one of the grounds of appeal is that the Assistant Native Commissioner went beyond the record in stating that by a will of Kafile Lande his great house and minor house had been disinherited, since there was no legal evidence on record as to the contents of the will.

In his reasons for judgment the Assistant Native Commissioner makes reference to this will and draws certain conclusions therefrom. Further, from his examination of the Plaintiff, the Assistant Native Commissioner imported into the record matters coming within his peculiar knowledge of a document not produced in Court. It is difficult to believe that the mind of the Assistant Native Commissioner was not influenced by this knowledge. Apart from these considerations this Court cannot overlook the attitude adopted by the Plaintiff subsequent to her return from the farms.

The appeal is accordingly allowed with costs and the judgment in the Court below altered to "Absolution from the instance with costs of suit".

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NO .21 -

GOVANA GQODO VS. LAPATU FENI.

U M T A T A. 9th Sept. 1931.

Before R.D.H.BARRY President, R.H.WILSON & A.G.MCLOUGHLIN, Members of the Native Appeal Court(Cape and O.F.S.Division).

APPEAL: GROUNDS OF OBJECTION IN LIMINE: GROUNDS OF APPEAL NOT EMBODIED IN PLEA, OVERRULED.

(Appeal from the Court of Native Commissioner: MQANDULI)

The Plaintiff (Respondent) in his capacity

as...../

as brother and heir of the late Gxeki Feni sued the Defendant (Appellant) for
(a) Seven head of cattle or their value £35, being dowry received by Defendant for one Nomanqeke.
(b) A declaration that he is the guardian of two girls named Nompisekaya and Nombini, daughters of Nonotisi, and
(c) For four cattle or £20, being the balance of the dowry paid by Plaintiff's late brother, Gxiki Feni, for Defendant's daughter Nonotisi, on the ground of her marriage to one Sende and the fact that the Defendant received a second dowry for her.

The defence is that the woman Nonotisi was never the wife of Gxiki Feni.

In the course of his evidence, the Plaintiff alleged that nine cattle were paid as dowry for Nonotisi, and as she had four children of whom three were alive, he was prepared to allow for a deduction of four cattle for the three girls and the wedding outfit.

Judgment was given for Plaintiff,
(a) Declaring him to be the legal guardian of the three girls in question;
(b) The restoration of four head of the dowry paid to him for Nonotisi;
(c) The delivery of four cattle plus their increase, seven in all, paid to Defendant as dowry for Nomanqeke, but
(d) The Plaintiff to pay Defendant 3 cattle as maintenance for the three girls and one beast for the wedding outfit.

Against this judgment the Defendant has appealed on the ground that it is against the weight of evidence and the probabilities and that even if Nonotisi's marriage to Gxiki Feni were proved, that according to custom, the Plaintiff should only be awarded two cattle from that dowry, and not four. Further, that the deduction allowed for the maintenance of the girls and their tombisa expenses and the expenses of the marriage are not sufficient.

At the hearing of the appeal an objection in limine was taken by the Respondent's attorney to grounds 3 and 4 of the appeal in that the defences raised therein were not pleaded in the Court below and could not, therefore, be taken for the first time on appeal.

In view of the pleadings it would have been pure surplusage for the Defendant to have elaborated his plea by the inclusion of the matter contained in grounds 3 and 4 of his Notice of Appeal. No new defence was raised in those grounds, which amounted merely to an attack on the judgment of the Court below and which did not go beyond the pleadings. The objection was accordingly disallowed with costs.

The record contains numerous discrepancies as between the statements of the various witnesses but after a careful perusal of the record, this Court considers that there is sufficient corroborated evidence to justify the Native Commissioner's findings on the facts.

The Native Commissioner in his judgment made no allowance for the tombisa expenses of any of the

girls...../

girls and this Court considers that there is nothing on the record to have justified the adoption of any other course.

The girl Nomangeke was alleged to have been given in marriage with the Plaintiff's consent. The defence maintains that the girl was given in marriage without the Plaintiff's authority, which would be consistent with the whole ground of the defence. There is, however, no evidence on the record to satisfy this Court that this girl has in fact, been tombisaed.

The appeal is accordingly dismissed with costs.

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NO.22.

SIVOKOMI SILOKO & DYUBELE SILOKO VS. NDEVUZENJA MADIKANE

U. T A T A : 10th Sept. 1931.

Before R.D.H.BARRY, President, R.H.WILSON & A.G.MCLOUGHLIN, Members of the Native Appeal Court(Cape and O.F.S.Division).

SEDUCTION - DAMAGES - COSTS - TENDER- WHERE CATTLE CLAIMED AND TENDERED, PLAINTIFF ESTOPPED FROM DEMANDING DAMAGES IN MONEY ONLY.

(Appeal from the Native Commissioner's Court: MQANDULI).

In this case the Plaintiff(Respondent sued the Defendants(Appellants) jointly and severally for the sum of £15 as damages arising out of the first Defendant's adultery with the Plaintiff's wife, Nohotele.

In the plea commission of the adultery is admitted, but the Defendants allege that before issue of summons the Plaintiff's claim was admitted and that three cattle/tendered to Plaintiff's agent, which tender was/were/ refused, the agent claiming six cattle. This tender was repeated in the plea, judgment was consented to but application was made that Plaintiff be ordered to pay the costs of suit. Judgment was entered for Plaintiff in the sum of £15 with no order as to costs. Against this order an appeal and cross-appeal have been noted.

The appeal is noted on the ground that the Plaintiff demanded six cattle, but as the Court found that 3 head of good cattle had been tendered, very near the value of £15, and that they were reasonable cattle, such as a native would accept as dowry, the tender was sufficient and should have been accepted by the Plaintiff, more especially as in this case the Plaintiff in the first instance demanded cattle from the Defendants and not money.

The cross-appeal is against that portion of judgment depriving the Plaintiff of his costs and is based on the ground that, the Plaintiff was successful in his claim for £15, and further that the alleged tender of three head of cattle made prior to the issue of summons

was...../

was not a full legal tender.

To the plea the Plaintiff replied that his claim being one for £15 damages sustained by him and not one for cattle, he was not compelled to accept same, even had a tender of cattle been made. Should this contention be overruled then the Plaintiff denies that any tender was made to his messengers. He admitted that the Defendants informed his messengers that they were willing to pay 3 head of cattle but that when the messengers demanded to see the cattle the Defendants refused to point them out.

Now, according to the evidence led, this Court entertains no doubt that the Defendants tendered three cattle of fair average quality but these were refused by the Plaintiff's messengers, who demanded 6 head. Thereafter summons was issued and the Plaintiff claimed £15 and got judgment.

The point to be determined is whether the tender of the 3 cattle was sufficient. The cases of Mvelo Ngovuza vs. Kasini Xelo, and Bolani Mbali vs.Luhaya Badizo, reported on pp.9,10 and 11, Vol 3, N.A.C. relate the process by and reasons for which claims for damages in these cases came to be made either in form of cattle or their alternative value, or their value only.

Originally the basis of payment was with cattle but as summons had to be stamped a fair average value of cattle was fixed in order to meet revenue requirements. Later, owing to epidemics and the resultant but not complete denudation of the country of cattle, those that survived became of enhanced value and consequently, the Courts, in view of abnormal conditions, regulated their awards on bases of equity and either raised the recognised average alternative value of cattle, or allowed claims for money only.

Notwithstanding all these variations which were brought about by changing conditions, sometimes of a temporary nature, the basis of payment has been cattle, and as stated in the case of Mapango vs. Zuma (Vol I,Henkel), the Defendant (in a restoration of dowry case) had the alternative of paying cattle. At the present time it is common knowledge that there are no epidemics among cattle, that the country is well stocked and that normal conditions obtain in this respect. Such being the case, and having regard to the fact that the real basis of payment of damages in these cases has from time immemorial been in cattle, this Court is of opinion that the tender made in response to the demand for cattle, was in all the circumstances an adequate one.

In the case of Bolani Mbali vs. Luhaya Badizo, already quoted, the judgment stated inter alia; "Under Native custom all claims of this nature are made in "cattle and formerly dowry could be paid in stock only, but "of late years changes have come about and money is fre- "quently paid but always as so much- usually £5- representing "a beast. Had the Appellant sued for £15 only, the Court is "of opinion that the Magistrate in the existing conditions "of East Coast Fever in his district would have been justified "in giving a money judgment, but as his judgment is in terms "of the summons under which, and by Native Custom, the "Respondent had the option of paying in cattle, the appeal "must be dismissed with costs. "

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The difference between that case and the present one is that in the former cattle or their monetray value was claimed whereas, in the latter only money was claimed after a claim had been made for cattle only and a tender of cattle made.

In the judgment just referred to, the fact was again emphasized, as was done in the case of Mvelo Ngovuza vs. Rasini Xelo, that claims and payments in money arose as matters of pure expediency. One of the underlying principles in the Mvelo Ngovuza case would seem to be the application of the Common Law doctrine of estoppel and the Plaintiff having claimed cattle, should have accepted cattle if suitable.

As already pointed out, the conditions generally in regard to cattle are normal and the position to-day is much the same as before the cattle scourages visited the Territories.

In the present case the Respondent himself sought his remedy in pure native custom by claiming payment in stock only. The tender in cattle only was rejected not because they were unsuitable, but because they were less than the number unjustly demanded, and in the special circumstances of this particular case, this Court is of opinion that the appeal must be allowed. The Plaintiff elected to claim cattle and was tendered good cattle in accordance with pure native custom, which tender he rejected and should have accepted.

On the cross-appeal, this Court having allowed the appeal, and following the decisions in Mcapu vs. Gondani, 4 N.A.C.297, and Gross vs. Crofton, 1920 A.D. 5, holds that the Plaintiff's conduct was such as to deprive him of his costs, he having definitely refused a suitable tender made before issue of summons, acceptance of which would have dispensed with the subsequent litigation.

The appeal is allowed with costs and the judgment of the Court below altered to "Judgment for "Plaintiff for the three cattle tendered or their value "£15, the Plaintiff to pay costs".

Mr. R.H. Wilson dissents from this judgment except in so far as it disposes of the question of costs.

NO.23

POTO VS. COSTA.

LUSIKISIKI: 14th Sept. 1931.

Before.R.D.H.BARRY,PRESIDENT, G.B.M.WHITFIELD & H.M.NOURSE, Members of the Native Appeal Court(Cape & O.F.S.Division).

PONDO JUSTOM - SUCCESSION - GREAT WIFE - PARAMOUNT CHIEF ALONE HAS RIGHT OF NOMINATING HIS GREAT WIFE. AMANIKWE TRIBE - FORMERLY BRANCH OF "ABAMBO" - NOW INTEGRAL PART OF PONDOS - MUST FOLLOW LAWS AND CUSTOMS OBTAINING IN PONDOLAND: FIRST MARRIED WIFE IS GREAT WIFE.

(Appeal from the Court of Native Commissioner: BIZANA)

The Plaintiff(the Appellant) sued the Defendant (Respondent) for a declaration of rights in his favour as heir of the late Mbalwa and stated in his summons:

1. Plaintiff is the eldest son of the late Headman Mbalwa by his wife Mantola (being the third wife married by the said Mbalwa) and Defendant is the eldest son of the said Mbalwa by his first wife Magadeni.

2. The late Mbalwa was a chief of the Amanikwe Tribe, and in accordance with the custom obtaining in such tribe, nominated the said Mantola as his great wife and her dowry was paid by the tribe.

3. By virtue of such nomination the Plaintiff, as eldest son of Mbalwa and Mantola, is the heir of the late Mbalwa, but the Defendant refuses to acknowledge or recognise the Plaintiff's right to such heirship.

The Plea alleges:-

1. That the parties are Pondos.

2. That under Pondo law and custom only the Paramount Chief has the right to nominate his great wife, in all other cases the wife first married is the great wife.

The replication by the Plaintiff contends that although the parties are to all intends and purposes considered Pondos, they belong to the Amanikwe tribe which is not subject to the prohibition against the nomination as a great wife of a wife not the first married and that according to custom the right so to nominate obtains amongst the chiefs of the Amanikwe tribe and is accordingly a custom entitled to recognition.

Voluminous evidence has been led which is apt to cloud the issue but the basis of the action is clear.

The facts are as follows:-

The late Mbalwa was the son of the late Makawula by his first wife Madwayisa. Mbalwa had a number of wives, the first being Magadeni, the mother of Costa (Defendant) and Mantola being the fourth and mother of the Plaintiff.

While the evidence of Chief Regent Mswakeli and that of witnesses Mbokojwana and Ncanca is to the effect that the Amanikwe tribe are true Pondos, Chief Mswakeli goes on to state that they do not fall under the head of "Abambo", a generic term applied to natives who came into Pondoland from the north as a result of upheavals in Natal and Zululand. But he admits that he cannot say where they sprang from except that they fall amongst the Amabala and Amanyati tribes, which are true Pondos.

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The ancient witness Ncanca, while maintaining that the Amanikwe are Pondos, yet admits that he came over with Majavu and the Amanikwe tribe when they entered Pondoland. He knows only of Mbalwa who nominated his chief wife and never heard of its having occurred before.

Mbokojwana, another very old witness, and member of the tribe, states that the Amanikwe are Pondos and are also known as "Amanyati" and "Amabala" and that originally they lived at the Mgazi river to the west of the Umzimvubu. They fled from Faku and went beyond the Umtamvuna and returned from there to Pondoland, owing to the taxes imposed on them in Natal.

As opposed to this testimony, Mcingana, uncle and guardian of the Plaintiff, maintains that the Amanikwe came originally from Zululand before Tshaka's time and that according to ancient tradition one chief, Mzaba, nominated his second wife as chief wife and that her son, Majavu, became chief or headman. Further on in his evidence he admits that Mzaba was only a regent. This witness goes on to say that the only chief who was not the son of the first wife was Mpikwa, that he too, was only a regent and that the tribe has been in Pondoland since the first raid of Tshaka. There is no proof adduced that this tribe has ever exercised the right of nomination.

The weight of evidence is in favour of the assumption that the Amanikwe probably formed one of the remnants of the tribes that were driven out of Natal into Pondoland, but while the origin of many of these tribes can be definitely traced to Natal and Zululand by means of the Report of the Native Affairs Commission of 1883, the Amanikwe are not specifically mentioned

Some of these remnants of tribes who found sanctuary in Pondoland maintained cohesion and followed their customs to a more or less extent and among some it appears that the privilege of a chief of nominating a wife as chief wife was recognised and this is borne out by chief Mswakeli, who himself states that the chiefs of some of these tribes do exercise that privilege.

It now becomes necessary to look into the more recent history of this tribe to determine to what extent, if any, their original practice in this connection has become abrogated due to non-usage or by reason of their absorbtion into the Pondo nation.

As far as can be gathered from the evidence, Mpikwa, although not a son of a first wife, was only a regent and not a chief. Since Mpikwa's time four generations have arisen and it is not until the present one came into existence that the question has arisen in a concrete form for, as already stated, the Defendant had admitted the nomination of Mantola as chief wife and the payment of her dowry by the tribe.

It is common cause that all occurrences in connection with the marriage and succession in relation to the heads of this tribe have been reported to the chief or chief regent of Eastern Pondoland, and in this respect the attitude adopted has been that of a sub-tribe of a paramount chief.

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It seems clear that the right of nomination by this tribe, if ever it existed, has fallen into disuse and that the tribe is and has been an integral part of the Pondo nation for some eighty years. Mbalwa, the father of the two contestants, in a dispute with Umhlekwa, took up the attitude that such a right did not exist.

The reason for the nomination of Poto's mother was probably due to her being of chief rank in her own right. Then there are the illuminating minutes of the meeting before the Native Commissioner in regard to the nomination of a successor to the late headman Mbalwa.

At the first meeting on the 9th of May 1930, there were present the chief members of Mbalwa's family and 70 other men of the tribe. They were then unanimous that the right of nomination existed and that the Plaintiff was heir. On the 26th November 1930, another meeting was held when again about 75 members of the tribe attended including Mhlekwa, Paulosi and Makanzi, uncles of Mbalwa, and Timothy the brother. These men, although they attended the first meeting, they at the second were as unanimous that the Defendant was the proper heir.

From this it will be seen that the members and leaders of the tribe are themselves dubious on the point or otherwise do not know whether this custom and privilege obtains. They are divided on the point and many of them, including the leading men, of the tribe, have expressed contrary opinions.

On the facts as disclosed, this Court has come to the conclusion that whatever the origin of this tribe may have been, it is and has been for the best part of a century an integral portion of the Pondo people and have followed Pondo customs; that its members are unable to state with precision what the custom is on this point and that the right of nominating a chief wife has arisen only recently.

For these reasons the appeal is dismissed with costs.

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NO. 24.

MBEMBE VERSUS JUBELE & 24 ORS.

LUSIKISIKI. 14th Sept, 1931.

Before R.D.H.BARRY, C.B.M.WHITFIELD & W.R.BOAST, Members of the Native Appeal Court(Cape and O.F.S.Division).

DAMAGES: INADEQUANCY OF: ASSAULT - SERIOUS BODILY INJURIES. EACH CASE TO BE DEALT WITH ON ITS MERITS - NATIVE LABOUR ACT'S ACT OF 1911, NO UNIVERSAL GUIDE IN ASSESSMENT OF DAMAGES.

Appeal from the Court of Native Commissioner:TABANKULU).

The Appellant(Plaintiff) sued the

Respondents...../

Respondents jointly and severally for £200 as and for damages sustained as the result of being assaulted by the Defendants. The Respondents made a tender of £25 but the Magistrate awarded £50, and against this an appeal has been lodged on the ground of inadequacy.

The Respondents were convicted in the Magistrate's Court on a charge of assaulting the Plaintiff and were each sentenced to pay a fine of £4. In his reasons for judgment the Magistrate states that he found - and this Court on the evidence agrees - that the assault had been unprovoked.

The record discloses:-

1. That the Plaintiff is a man in the prime of life.
2. That his life has been shortened by 15 years.
3. That he was in hospital for two months and suffered and is still suffering pain
4. He was wounded over the right eye through which would the brain could be seen pulsating.
5. He had the left eye-brow split open.
6. He had the roof of his nose smashed.
7. He had his lower jaw smashed in three places.
8. He had his lips burst.
9. He had his right thumb fractured.
10. He had four of his lower central incisors removed, together with a large piece of the lower jaw bone.
11. He had to have his jaw 'wired' so as to bring the fragments into juxta position.(On this point the District Surgeon states:- "The danger of a 'wired jaw' is that one "of the fragments may die and set up scepticimea.").
12. His jaw is useless for masticating.
13. He is wholly confined to liquid diet for the rest of his life as there is no strength in the jaw and his jaws can only open to the extent of a quarter of an inch.
14. He will suffer, according to the District Surgeon, great pain.
15. He is in such a condition that he cannot be recommended as a proponent for insurance.
16. He is quite precluded from proceeding to the Mines, to which labour centre he has been in the habit of going.
17. He has been permanently disfigured.
18. He is not able to do ploughing for more than a couple of hours daily.

19. His disbursements in medical fees and ambulance charges amount to £18.

Various cases have been cited to show what the measure of damages should be in the present one. All these differ in character and circumstance and, while they may serve to a certain extent as a guide each case, as it arises, must be dealt with on its merits.

In questions of damages arising out of assaults, this Court will not interfere in cases unless awards made are extravagant, unreasonable, inadequate or violate any principle of law. Neither does this Court subscribe to the contention that in arriving at the measure of damages to be awarded in assault cases, it should in all instances be guided by the scale of awards made under the Native Labour Agents Act. of 1911.

Having...../

Having regard to all the circumstances of this case the Court is of opinion that the Plaintiff is entitled to a greater measure of damages than has been awarded in the Court below. The appeal is allowed with costs and the judgment in the Court below altered to one "for Plaintiff for £120 and costs of suit, the one paying the other to be absolved."

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NO. 25

MACALA BUNGANE VS. POLOZA NONGWADI.

K O K S T A D: 19th September, 1931.

Before R.D.H.BARRY.PRESIDENT:F.N.DORAN & W.H.P.FREEMANTLE. Members of the Native Appeal Court(Cape & O.F.S.Division)

NATIVE CUSTOM - HLANGWINI DOWRY: 24 HORNED CATTLE, 2 HORSES AND 1 MQOBO BEAST, RECOGNITION OF -

(Appeal from the Court of Native Commissioner:MATATIELE)

The Appellant, the Plaintiff in the Court below sued the Respondent(Defendant) for the payment of 18 cattle or their value £5 each and alleged that the Defendant married his (Plaintiff's) daughter Ncimezi, promising and agreeing to pay dowry under Hlangwini custom, 26 head of cattle and one horse, and paying 8 head of cattle and one horse on account thereof, leaving a balance of 18 head of cattle still due to Plaintiff. Further that Defendant's wife was with Plaintiff and that she has been at all relevant times tendered to Defendant and is again tendered to Defendant but he refuses to have her.

The Defendant's plea is as follows:-

1. A promise to pay dowry under Hlangwini custom, if made, (which in this case is denied), cannot be sued upon inasmuch as there is no such thing as a recognised Hlangwini dowry.
2. Furthermore, Defendant returned the woman on the grounds of her having been found twice committing adultery and is prepared to allow Plaintiff to retain the dowry he has already paid, which he says is 10 cattle, 1 horse and 1 mqobo beast, as set out in a letter addressed by Defendant's attorney to Plaintiff's attorney on the 22nd August 1929.

In his replication the Plaintiff denies paragraph 1 of the plea as also the allegation that Defendant returned the woman on the ground of her having been found twice committing adultery and states that in any case, it is not a sufficient ground to enable Defendant to avoid liability for the balance of dowry. Judgment was given for Defendant as prayed and on the matter coming before this Court on appeal, it was ordered that, as the main point at issue is whether the amount of dowry to be paid in respect of an Hlangwini customary union is recognised by practice and usage at a particular number of stock that the record be returned for expert evidence on the point to

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be recorded and thereafter for the case to be returned for disposal.

The expert evidence now submitted consists of expressions of opinion by Hlabati, who describes himself as a chief of the Hlangwinis of Malenge location, Umzimkulu, and Mordecai Baleni who states that he is the head of the Hlangwini tribe in Matatiele. Both these men, who are apparently of high rank in the tribe, state definitely that according to Hlangwini custom dowry is fixed at 24 horned cattle, 2 horses and 1 mqobo beast, and that if a husband does not pay the full dowry then the father of the girl sues for the balance and further, that the system of teleka is not practised. No evidence to the contrary was led at the further hearing of the case.

In the case of Matshana vs. Noju and Mfanonina, N.A.C.1, p.140, the Court held that dowry is not fixed by Hlangwini custom and this ruling was followed in the case of Noliya Zandile vs. Nomzwembe, N.A.C.3 p.79, . In these cases there is nothing to indicate whether the decision was based on expert opinion or otherwise, but this Court considers that in the light of the authoritative exposition of the custom given by the two chiefs, who were specially selected for the purpose, the number of dowry to be paid must be regarded as fixed by practice of the tribe at 24 cattle, 2 horses and 1 mqobo beast.

The points arising from the somewhat involved and argumentative grounds of appeal and to be decided are:-

(1). Whether the parties are bound by a fixed dowry.

(2). Whether in view of the fact that the Defendant rejected his wife he is no longer liable for the balance of the dowry due.

As regards No.1, this Court accepts the expert evidence which is to the effect that according to Hlangwini custom the number of dowry is fixed and that on that ground the Plaintiff is entitled to succeed.

As regards No.2, while it is true that a marriage can be dissolved by the rejection of a woman by her husband, in this case the motive is obviously to avoid the payment of the balance of the dowry and not the fact that the woman is alleged to have committed adultery. The latter in itself, is ordinarily not a ground for dissolving a customary union by either spouse, the injured husband having another remedy at law.

This Court is therefore, of opinion that the appeal must be allowed with costs and the judgment of the court below altered to:-"Judgment for Plaintiff as prayed "with costs of suit".

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NO. 26.

MWENA COBOKWANA VS. JACKSON MZILIKAZI.

KOKSTAD: September 19th, 1931.

Before.R.D.'.BARRY.PRESIDENT.F.N.DORAN & W.H.P.FREEMANTLE. Members of the Native Appeal Court(Cape & O.F.S.Division).

MARRIAGE BY CHRISTIAN OR CIVIL RITES — DIVORCE ON GROUND OF HUSBAND'S ADULTERY. HUSBAND DEBARRED FROM CLAIMING RETURN OF DOWRY, THE DISSOLUTION OF THE UNION NOT BEING TATAMOUNT TO REJECTION ON THE PART OF THE WIFE. DOWRY, PARENT OR GUARDIAN ENTITLED TO HOLD A SECOND DOWRY FOR DIVORCED WIFE, IF HUSBAND IS THE GUILTY PARTY.

(Appeal from the Court of Native Commissioner: MOUNT FRERE)

The facts as disclosed in the pleadings are common cause and no evidence has been led.

The Plaintiff (Respondent) sued the Defendant (Appellant) for certain stock or their value and in his summons states that he married the Defendant's sister Maggie, by Christian rites and paid the stock in question plus £1 - 10 - 0, as dowry, that she divorced Plaintiff and the Defendant having received a second dowry for her from one Joseph Kayibana, he (Plaintiff) is entitled to the return of the dowry he paid for the girl Maggie.

In his plea the Defendant admits the foregoing facts but contends that inasmuch as the Plaintiff's wife obtained a divorce from the Plaintiff in the Native Divorce Court on the grounds of Plaintiff's adultery with one Ellen Zweni, the Plaintiff so misconducted himself as to render it impossible for his wife to live with him and thereby did in fact reject her, in consequence of which rejection the Plaintiff had forfeited his right to the restoration of the dowry he paid.

The Plaintiff has admitted that his wife obtained a divorce as stated.

The Assistant Native Commissioner gave judgment for the Plaintiff as prayed with costs and states in his reasons that in arriving at his decision he was guided by the rulings of the Appeal Court bearing on this case namely:-

(1). That where the question of dowry arises in a civil marriage, it shall be decided according to Native custom.

(2). That no person may hold two dowries for one woman.

(3). That adultery in itself, according to Native custom, is not sufficient cause for one to forfeit dowry.

The appeal against this judgment is on the following grounds:-

1. That the judgment of the Assistant Native Commissioner is wrong in law.
2. That the Respondent brought about a dissolution of his marriage by his own guilty conduct and he has therefore, forfeited all claim to the restoration of any dowry paid by him.

While this Court is generally in agreement with the broad principles enumerated by the Assistant Native Commissioner in his reasons for judgment, it is of opinion that he has not appreciated all the implications of this

particular...../

particular case in all its bearings. In the case of G.Gomani vs. D.Baqwa, (3.N.A.C.p.71), the question was fully gone into. There the Plaintiff, the husband, sued for the return of the dowry paid by him to the father of his wife to whom he was married according to Christian rites and from whom he was divorced on the ground of her adultery.

An exception was taken to the summons in that it disclosed no cause of action inasmuch as the dowry was paid under Native law and custom and that adultery on the part of a wife does not entail the return of dowry. The Magistrate upheld the exception but on appeal his ruling was reversed, the Court holding that even if her conduct would not under Native law and custom entitle the husband to the return of the dowry, it would be repugnant to justice and equity to say that a woman and her father, who was a party to the contract, should be allowed to benefit by the woman's misconduct.

The case of Welton Sicence vs. Mlanduli Lupindo, (3.N.A.C.p.164), is similar to the one now before the Court, the only difference being that in the former the husband after entering into a Christian marriage, contracted a union with another woman according to custom. An exception was taken that the summons disclosed no cause of action inasmuch as dowry is not recoverable when a marriage is dissolved on the ground of adulter OF THE PERSON WHO PAID the dowry. The exceptin was upheld by the Native Appeal Court. In the case of Mnukwa vs. Mkohlwa, (3. N.A.C.p.55) it was stated in the course of judgment that "the mere fact that his wife divorced him does not in the opinion of this Court entitle the Plaintiff to claim a refund of the dowry paid".

Again in the case of Hebe vs. Mdinelwa Mba (12.E.D.C.6), it was laid down that where a Plaintiff paid lobola to Defendant on becoming engaged to his daughter and the marriage by Christian rites was delayed for some time, and during this time the Plaintiff had intercourse with another woman, and on account of his misconduct Defendant's daughter refused to marry him, the Plaintiff demanded the return of the lobola, that as the marriage was broken off owing to Plaintiff's misconduct, the Defendant was entitled to retain the dowry. Following this case in the judgment of Lupusi vs. Makalima, the President stated that "misconduct on the part of the girl is always sufficient ground for the man to break the engagement and recover the cattle paid on account of dowry. It is only just that the converse should apply".

Going further back to the Report of the Native Affairs Commission of 1883 (page 30) the whole basis of the payment of dowry is reviewed and the Commission reports, inter alia:-

"If the wife wrongly leaves the husband the dowry must be "returned; while upon proof of the husband's misconduct, "which leads to desertion, the ikazi or its equivalent may, "wholly or in part, be ordered to be retained by the father".

Now as stated by the Assistant Native Commissioner in his reasons, adultery in itself, according to Native custom, is not a sufficient cause for one to forfeit dowry paid.

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This expression of opinion is consistent with Native law where a customary union only has been entered into, but in the present case the parties, by mutual consent, agreed to and entered into a marriage by Christian rites, thus importing into their union certain principles which are absent in the case of a marriage by Native custom. The main difference so far as it concerns this case, is that whereas infidelity on the part of one of the spouses is ordinarily no ground for a dissolution of a marriage by Native custom, the converse holds in the case of a marriage by Christian rites.

As previously pointed out, this Court has already decided that the return of dowry is claimable in the case of a dissolution of a Christian marriage arising out of the misconduct of the wife and logically the converse must also hold good in the case now before the Court in which the marriage was dissolved owing to the infidelity of the Plaintiff.

For these reasons and in the light of the authorities quoted this Court is of opinion that in the circumstances the Plaintiff is not entitled to the return of the dowry claimed.

The appeal is allowed and the judgment in the Court below altered to one for Defendant with costs.

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NO. 27.

STANFORD NTLANGANO VS. NOCIZELA NTLANGANO.

BUTTERWORTH: 29th SEPTEMBER, 1931.

Before R.D.H.BARRY.PRESIDENT.H.E.F.WHITE & E.F.G.MUNSCHEID, Members of the Native Appeal Court(Cape & O.F.S.Division).

NATIVE CUSTOM - SUCCESSION - APPORTIONMENT OF SONS - SON OF QADI HOUSE HEIR IN GREAT HOUSE, OUSTING SON ALLOTTED FROM RIGHT HAND HOUSE.

(Appeal from the Court of Native Commissioner;IDUTYWA).

The Plaintiff (Respondent) sued the Defendant (Appellant) for the restoration of certain stock, title deed, dipping books and for an order of ejectment of the Defendant.

It appears that the Plaintiff is the widow of the qadi house of the late Ntlangano, who had three wives, viz:- the great, the right hand and the qadi house wives. In the great house there was one son named Maqanda, who died without issue. In the right hand house there were three sons, the eldest being the Defendant and the second a boy named Mayezweni.

In the qadi house is a minor son who the Plaintiff maintains is the heir to the great and qadi houses, whereas the Defendant contends that, as the younger brother, Mayezweni, was allotted to the great house as a younger

brother..../

brother of Maqanda, he is the heir and not the son of the qadi house.

The Plaintiff in her replication denies that Mayezweni was allotted to the great house and no evidence has been led on the point. By consent of the parties the Court below on being moved to give a ruling on the point as to whether the Defendant can succeed even if it is proved that Mayezweni was apportioned as the younger brother to Maqanda, decided in the negative, basing its decision upon the opinion expressed by the Native Assessors in the case of Sidingana Payi vs. Dweza Payi, (3.N.A.C. p.271).

It is well recognised custom that in the absence of an heir in a great house the eldest son of the qadi to the great house succeeds. In this case Mayezweni, the younger son of the right hand house, who was allotted to the great house merely as a younger brother to Maqanda, the son of the great house, is aged about 15 years, and the minor son of the qadi is very much younger, so that the apportionment of Mayezweni was made probably before the former's birth or even as suggested in the pleadings, before Ntlangano married his qadi wife.

The decision quoted by the Native Commissioner in his reasons is emphatic and it is there unequivocally laid down that under custom the apportionment of brothers the younger brother apportioned to an elder brother does not oust the lawful heir.

This decision is consistent with that given in the case of Ngwebi Zito vs. Ntlungu Zito, (4.N.A.C.p.135).

The case having been put to the Native Assessors, they state that the proper person to succeed the late Ntlangano in his great house is the son of his qadi house.

This expresion of opinion is in accord with previous decisions of the Court.

The appeal is dismissed with costs.

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No. 28.

MAFULENI ZAKE VS. KWEPETSHE TSHISA.

BUTTERWORTH: 30th SEPTEMBER: 1931.

Before R.D.H.BARRY.PRESIDENT: H.E.F.WHITE & W.F.C.ROLLIP, Members of the Native Appeal Court(Cape & O.F.S.Division).

DAMAGES - REMOTENESS OF. ATTACHMENT WITHOUT PROCESS OF COURT AND ON WRONGFUL PREMISES.

(Appeal from the Court of Native Commissioner:WILLOWVALE)

The Appellant (Defendant in the Court below) sued the Respondent(Plaintiff) for the sum of £5 as damages

for...../

for the wrongful dispossession of certain three cattle for a period of seventeen days.

The plea amounts to a denial and an allegation that the first the Defendant ever heard of the Plaintiff's claim was when he received a demand. Judgment was given for Plaintiff for £3 - 16 - 9, and against this order an appeal has been noted on the grounds :-

(1) That as Defendant merely pointed out the stock he is not liable for spoliation.

(2) That the amount of damages awarded against Defendant is excessive (even if he were liable for same) and that the Native Commissioner erred in awarding the sum of £2 -10/-, being Plaintiff's railway fare from Cape Town, as such damages were too remote.

It appears from the evidence that the Plaintiff has a kraal of his own and that his mother and sister live with him. The cattle forming the subject of the action were left at this kraal by the Plaintiff when he went to work at Cape town. During his absence these cattle were seized, it is alleged, by the Defendant.

The Plaintiff's sister is the widow of one Kweta who was the Defendant's brother. Mtwaku had incurred a debt of 6/9 plus charges with one Lindemann and is stated to have pledged a beast in security. This beast forms one of those seized. The witness Gidi states that he stood security for the same debt and that when payment was demanded from him he in turn requested payment from the Defendant(heir to Mtwaku, and that Defendant referred him to Mtwaku's widow.

It is attempted by the Defence to establish that it was Gidi who seized the cattle but it is obvious to this Court that the Defendant assumed his liability in the matter, instigated the seizure and even after the debt was paid, he persisted in endeavouring to deprive the owner of his property by applying to the Dipping foreman to have the cattle transferred to the name of one Fodu, at whose kraal the cattle were left after the seizure.

If these cattle really belonged to the estate of the late Kweta it is remarkable that they were in the possession of Kweta's wife's people. The seizure not under the process of Court, of three cattle for a paltry debt of 6/9, is in itself indefensible and the attempt on the part of the Defendant to have them removed from the name of the Plaintiff in the dipping registers, after the debt had been liquidated, raises a strong suspicion that it was the intention of the Defendant to deprive the owner of his property. Gidi had been paid and if he had seized the cattle it is unlikely that, having been paid, he would not have restored them.

The seizure was not made with the consent of the Plaintiff's mother who was presumably the person in charge of the kraal in Plaintiff's absence, for her conduct does not support such a conclusion. On the day of the seizure she proceeded to the headman to report the occurrence, but finding him absent she went next day to the Dipping foreman and the police, after which she telegraphed the information to Plaintiff.

The Court is therefore, of opinion that the deprivation by Defendant of the cattle in the Plaintiff's possession, was not justified.

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There remains the question of the amount of the award. The Plaintiff claimed the sum of £5 and the Court below awarded £3-16-6, after assessing the value of the milk lost to the inmates of Plaintiff's kraal for 17 days at £1-5-6, cost of telegram recalling the Plaintiff 1/3, and Plaintiff's railway fare from Cape Town, which was put down at £2-10/-.

It is clear from the particulars of the summons that the damages claimed rests on the deprivation of the inmates of Plaintiff's kraal of the milk of one of the cattle forming the subject of the case and while the measure of damages awarded in the Court below in respect of this item has not been arithmetically proved, yet in the peculiar circumstances surrounding this case and following the judgment in the case of Chiat vs. Oldham & Jankelowitz, 1917 C.P.D. p. 575, this Court is of opinion that proof of the item should not be too closely scrutinised.

The Defendant's conduct has through-out been high-handed and unjustfiable and, in any case, the measure of damages under this particular item can not be regarded as excessive.

As to the item of £2-10/- and 1/3, the Court considers these to be too remote from the cause of action to warrant their inclusion in the award. The items were not foreshadowed in the summons nor were they contemplated in the original demand for £2 sent to the Defendant.

To quote from Nathan's Common Law of South Africa, V 1. 3, p. 1878:-

> "The general rule, then, is that the damages must not be too remote, that is to say, they must be natural, reasonable, probable, and proximate result of the wrongful act."

It can not be maintained that these items are covered by this definition.

Moreover, the Plaintiff had been at work in Cape Town for ten months and his return to his home at a time probably sooner than would otherwise have been the case did not increase his travelling expenses - especially as there is nothing on the record to show that he intended or was bound to return to Cape Town to complete any contract binding upon himself.

Before this Court it was contended that its wide powers of review should be exercised in respect of the refusal of the Native Commissioner to allow the Defendant to lead evidence of ownership after having permitted the Plaintiff to do so.

The plea set up no defence of ownership the Defendant merely denying that he ever possessed himself of any cattle belonging to or in the possession of the Plaintiff and an allegation that the first he ever heard of Plaintiff's claim was when he received a demand.

In these circumstances this Court is not prepared, under its powers of review, to set aside the proceedings in the Court below.

The appeal is...../

The appeal is allowed with costs and the judgment of the Court below altered to one for Plaintiff for £1-5-6, with costs of suit.

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NO. 29

SAM TSOTSI VERSUS SPOPONI DYOSI.

KINGWILLIAMSTOWN: 20th October, 1931.

Before R.D.H.BARRY: PRESIDENT & J.HENKEL & W.M.HARTLEY: Members of the Native Appeal Court (Cape & O.F.S.Division).

NATIVE CUSTOM (CISKEI) -SEDUCTION FOLLOWED BY PREGNANCY - DAMAGES FOR IN THE ABSENCE OF SPECIAL CIRCUMSTANCES - FIVE HEAD OF CATTLE BUT MAY VARY ACCORDING TO CIRCUMSTANCES.

(Appeal (test) from the Court of Native Commissioner - KINGWILLIAMSTOWN)

In this case the Plaintiff (Appellant) sued the Defendant(Respondent) for 5 head of cattle as and for damages for the seduction and pregnancy of his ward, one Mary Jane Tsotsi. The Additional Native Commissioner gave judgment for Plaintiff for 3 head of cattle or their value £15 and costs of suit, and against this award an appeal has been lodged on the ground that it is bad in law and not in accordance with Native custom as laid down by the Native Appeal Court,Kingwilliamstown, in that the Additional Native Commissioner gave judgment for only three head instead of five, which had been claimed, the action being one of seduction followed by pregnancy.

In his reasons for judgment the Additional Native Commissioner states that though not unmindful of the judgment of the Native Appeal Court in the case of Solomon vs. Faba, it is submitted that over a period of 53 years during which the special Native Court of Tamacha has functioned, its awards in cases of this nature have been normally 3 head of cattle and that therefore, this has now been crystallized into sound Native law, in so far as this area is concerned.

Since the establishment of this Court in 1929, with jurisdiction over the whole of the Cape Province, it appears the only case of this character that has come for decision from the Ciskei area is that of James Solomon vs. Kolisile Faba and to which both the Appellant and the Native Commissioner have referred.

In that case, which was an appeal from the judgment of the Native Commissioner at Grahamstown, the Plaintiff alleged that the Defendant had paid 3 cattle, valued at £7- 10/-, on account of damage but a further sum of £12-10/- was claimed for damages plus £4-10/- for lying-in-expenses.

The Native Commissioner gave judgment in that case for Defendant with costs and in his reasons stated that the one witness produced by Plaintiff to give evidence on the point could give no information as to what the custom was under the circumstances in which

the,..../

the Plaintiff's daughter was placed, she being a woman of loose character.

The appeal was noted on the ground that the Assistant Native Commissioner should have awarded the customary damages for seduction and that at least 6 cattle or their value are payable as damages for the seduction of a minor daughter irrespective of any possible alleged subsequent seduction or seductions of the minor daughter by the Respondent or other parties.

In the course of its judgment on appeal the Court stated:-

"Although the claim in the summons is for money including "disbursements for lying-in expenses, it seems clear both "from the evidence and from the grounds of appeal that the "action is based on Native custom and that being so, Native "law must be applied ... There appears to be a diversity "of practice in the various districts of the Ciskei in "regard to the number of cattle claimable in cases of seduction followed by pregnancy. This Court is of opinion that "it is desirable to bring these differing practices into "line and to lay down what damages should ordinarily be "awarded.

"In the Transkeian Territories where Native law has been "preserved it is customary to allow 5 head of cattle or "their value at £5 each in such cases and, whilst not "wishing to interfere with the discretion of Courts of "Native Commissioners in assessing damages when very "special circumstances are present, this Court is of "opinion that an award of 5 head of cattle is reasonable.

"In the present case there is nothing to show that when the "Plaintiff's daughter was rendered pregnant by the Defendant "she was not a virgin and the fact that she has since had "a child by another man should not, therefore, affect the "amount of damages claimable for her defloration by Defendant

The appeal was allowed and the judgment of the Native Commissioner altered to one of absolution from the instance with costs.

Neither in this nor in the Native Commissioner's Court was the opinion of Native Assessors consulted and as the judgment in the case of Solomon vs. Faba was inconclusive and merely laid down that in the opinion of this Court an award of 5 cattle would ordinarily be reasonable without fettering the discretion of the Courts in cases where special circumstances occur.

The point at issue is put to the following Native Assessors:-

1. Chief George Songo Kama, from Middledrift;
2. William Mtoba, from Kingwilliamstown;
3. Albert Kwetsha, from Keiskamahoek
4. Mbovane Mabandla, from Victoria East and
5. Ben Balala, from Peddie.

Chief George Songo Kama states:-

"We Xosa say that the damages go according to tribes. We demand damages and the offending party pays. According to custom the Plaintiff is asked how vexed he is and he will say he wants so much. According to Xosa custom the number is not fixed.

"The...../

"The commoners say "Ta, we demand this number." The number is according to what one desires. It is like dowry and there is no fixed number, but the Native Courts decide the numbers. It makes no difference whether a Xosa claims from a Fingo or a Fingo from a Xosa. The Nkundla always gives what is asked for.

"If a man asks for 20 head he will be given 20 head, but each case has its own number.

"It is to our greatest surprise that three head have been awarded by the Native Commissioners. There is no custom as to the amount to be paid. A Native will say "I want 10 head", and the Defendant is asked to reply and he will say: "I have not that number and I pray."

"We give 6, 7 or 8 and that is as far as we can go. We decide according to the capacity of the Defendant to pay. This has nothing to do with dowry.

"Where the Defendant denies the seduction and the Native Court finds that he has been guilty, they award the amount demanded. I have heard the Native Courts making awards. It is a long time since we have had such cases because people run to the Magistrates. The last case tried by Natives was in the time of William Shaw Kama. Now people just come to the Magistrate and pay 3 head, which is a disgraceful thing.

"In later days I have not presided at Native Courts. Chief Ngangelizwe presides over the Native Court, but I cannot say if he has tried such cases."

WILLIAM TOSA states:-

"We are all in agreement and it makes no difference whether we are Fingoes or Xosas. I was born here, I am an old man. The practice of awarding 3 cattle has been laid down by Europeans and that has grieved us. Once a girl has been damaged she has no value for dowry purposes. This is our custom and obtains in all districts and among Fingoes. The Natives of Lady Frere come under the same rule. We Natives have never a fixed number of cattle as damages for our girls".

JOVANE MABANDLA states:-

"The Attorneys have come and upset the matter. The Basutos are separate from us. We have no Nkundlas in this District".

In the case of Solomon vs. Faba this Court indicated that awards of 5 head of cattle would ordinarily be reasonable in cases of this character but it also made it abundantly clear that it had no desire to interfere with the discretion of Native Commissioners' Courts.

This dictum is not departed from and is not in ortire conflict with the statement of the Native Assessors who however, go further and state in effect that the injured parent can claim what he wants and that cases are dealt with on their merits.

This opinion is a direct

contradiction..../

contradiction of what the Additional Native Commissioner has stated is understood by Natives to be Native custom on this point. He arrives at this conclusion from the fact that a purely local Court with no judicial status has over a long period of years been in the habit of awarding 3 cattle.

The Additional Native Commissioner in his reasons also states that his exposition of custom is borne out by the opinion of the Native Assessors at a recent session of the Appeal Court. A reference to that record shows not only that the case was one of seduction unaccompanied by pregnancy but that the Native Assessors apparently gave no opinion on points other than the one then before the Court.

A perusal of the evidence in the present case discloses no special circumstances, the Defendant is in good employment and in the light of the stated opinion of the Native Assessors it appears to this Court that there is no reason to withhold from the Plaintiff the measure of damages he has claimed - which incidently is consistent with the dictum of this Court in the case of Solomon vs. Faba.

The appeal is accordingly allowed and the judgment in the Court below altered to one for Plaintiff for 5 head of cattle or their value £25 and costs of suit.

Mr. J.Henkel dissented to above judgment.

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